No. 87-

In the Supreme Court of the United States

OCTOBER TERM, 1987

MICHAEL VITIELLO,
on behalf of himself and the
certified class of Data Access Systems, Inc.
shareholders, PETITIONER

v.

I. KAHLOWSKY & CO.,
PETER CUNICELLI,
TOLINS & LOWENFELS, and
ROGER A. TOLINS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. Whether, despite the decisions of this Court dating from 1830, and the decisions of every court of appeals, that require borrowing a limitations period drawn from state law to govern a federal cause of action where Congress has provided no limitations period, the court of appeals correctly held that federal rather than state law supplies the statute of limitations governing securities fraud actions under §10(b) of the Securities Exchange Act and SEC Rule 10b-5.

2. Whether, despite the unbroken line of decisions of this Court and the decisions of every court of appeals that tolling of the applicable limitations period is mandatory in all cases of fraud, the court below correctly held that tolling is inapplicable to the statute of limitations governing securities fraud actions under §10(b) and Rule 10b-5.

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Plaintiff Michael Vitiello, on behalf of himself and the certified class of Data Access Systems, Inc. shareholders, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 1a-41a) is reported at 843 F.2d 1537.

The opinion of the district court (App. B, *infra*, pp. 42a-60a) is unreported.

JURISDICTION

The judgment of the Court of Appeals (App. C, *infra*, pp. 62a-67a) was entered on April 8, 1988. The order of the court of appeals staying the mandate of that court until July 7, 1988 (App. D, *infra*, p. 68a) was entered on April 27, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTES AND RULES INVOLVED

Section 10(b) of the Securities Exchange Act, 15 U.S.C. §78j(b), provides:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or any facility of any national securities exchange—
>
> (b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the [Securities and

> Exchange] Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

Rule 10b-5 promulgated by the Securities and Exchange Commission, 17 C.F.R. §240.10b-5, provides in relevant part:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,
>
> * * *
>
> (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading . . . in connection with the purchase or sale of any security.

Sections 9(e), 18(c), and 29(b) of the Securities Exchange Act, 15 U.S.C. §§78i(e), 78r(c), and 78cc(b), are set forth in Appendix E hereto, *infra*, pp. 69a-71a.

STATEMENT OF THE CASE

A. Background

In June 1981 petitioner Michael Vitiello filed the first of approximately 16 similar securities fraud class actions in the District Court for the District of New Jersey, claiming that Data Access Systems,

Inc. ("DASI") had violated, *inter alia*, Section 10(b) of the Securities Exchange Act and Rule 10b-5 of the Securities and Exchange Commission.[1] The complaint alleged that DASI (at the time the largest independent distributor and servicer of computer data terminals in the United States), along with its officers, directors, and various individual and corporate parties related to DASI, had violated the anti-fraud provisions of the federal securities laws by including materially false information, including false financial statements, in DASI's public disseminations during the period October 31, 1978 through June 22, 1981, thus causing an artificial inflation in the price of the company's publicly traded stock. The civil actions, which were subsequently consolidated by the district court, were filed on behalf of all purchasers of DASI's stock in the wake of an indictment of DASI's chairman in February 1981,[2] and after DASI's outside auditors had notified the Securities and Exchange Commission ("SEC") that it had withdrawn its audit reports with respect to DASI's 1978-80 financial statements because they were materially misstated. In October 1981, the same month DASI's chairman resigned from the company following his conviction on the criminal charges, the SEC brought an injunction action

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[1] Jurisdiction was conferred upon the district court pursuant to Section 27 of the Securities Exchange Act, 15 U.S.C. §78aa, and 28 U.S.C. §1331.

[2] *United States v. Gerald R. Cicconi*, Cr. No. 81-50 (E.D. Pa.).

against DASI in the District of New Jersey alleging violations of the federal securities laws.[3]

DASI filed a petition for reorganization under Chapter 11 of the bankruptcy code in January 1983, and its plan of reorganization was confirmed in August 1984. Meanwhile, in March 1984, DASI's chairman pled guilty to criminal charges stemming directly from his involvement in the DASI securities fraud, and was sentenced to four years in prison. *United States v. Gerald R. Cicconi*, Cr. No. 84-40 (D.N.J.). In September 1984 the district court certified the consolidated civil litigation as a class action on behalf of purchasers of DASI's stock. *In re Data Access Systems Securities Litigation*, 103 F.R.D. 130 (D.N.J. 1984).

The SEC's injunction actions, the government's criminal prosecutions, and this securities fraud action spawned additional private civil actions brought by or against DASI's auditors and creditors. As a result of discovery conducted in an action between DASI's auditors and bank creditors, evidence was uncovered in 1985 of the involvement of additional entities and individuals in the DASI securities

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[3] *Securities and Exchange Comm'n v. Data Access Systems, Inc., et al.*, Civil Action No. 81-3362 (D.N.J.). The Commission action was resolved by entry of a consent decree which provided, *inter alia*, for the appointment of a special agent to investigate the allegations of the complaint. A parallel action against a DASI-related company was also filed by the SEC in the District Court for the District of Columbia. *Securities and Exchange Comm'n v. Transnet Corp.*, Civil Action No. 83-1886 (D.D.C.).

fraud. These entities included, *inter alia*, respondents I. Kahlowsky & Co. (a Philadelphia accounting firm that had served as auditors for a DASI-related company), Peter Cunicelli (an accountant at I. Kahlowsky & Co.), Tolins & Lowenfels (a New York law firm that had drafted the prospectus for DASI's 1979 public offering and prepared DASI's 1978-80 Form 10-K's), and Roger A. Tolins, the attorney at Tolins & Lowenfels who performed the firm's services for DASI. Based upon the new evidence uncovered in 1985, in January 1986 petitioner filed an amended class action complaint ("complaint") (App. F, *infra*, pp. 72a-104a) that named, *inter alia*, respondents as defendants.

B. Proceedings Below

1. *The Decision of the District Court*

Respondents moved to dismiss the complaint on the ground that it was time-barred by the expiration of the limitations period applicable to securities fraud actions under Section 10(b) and Rule 10b-5. In an unpublished opinion (App. B, *infra*, pp. 42a-60a), the district court (Brotman, J.) recognized that there was no uniform federal statute of limitations for implied private actions under §10(b), and that under this Court's decision in *Holmberg v. Armbrecht*, 327 U.S. 392 (1946), "[f]ederal courts must therefore refer to the forum state's most closely

analogous cause of action and its accompanying statute of limitations." (*id.* at 49a).[4]

The district court recognized that under established Third Circuit precedent, if petitioner possessed a cause of action against respondents under the New Jersey Blue Sky law, that statute's limitations period should be applied, but if he did not possess such a cause of action, the limitations period for common law fraud should apply. (*id.* at 50a). The district court determined that since the New Jersey Blue Sky law required buyer-seller privity and petitioner had not purchased his DASI stock directly from respondents, petitioner had no cause of action against respondents under the New Jersey Blue Sky statute. The limitations period applicable to petitioner's §10(b) claims was therefore not the two-year Blue Sky limitations period, but rather the six-year limitations period applicable to a New Jersey common law fraud claim. (*id.* at 53a). Since petitioners's §10(b) claims against respondents were

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[4] Specifically, in *Holmberg v. Armbrecht* the Court held:

> Apart from penal enactments, Congress has usually left the limitations of time for commencing actions under national legislation to judicial implications. As to actions at law, the silence of Congress has been interpreted to mean that it is federal policy to adopt the local law of limitation. [citation] The implied absorption of state statutes of limitation within the interstices of the federal enactments is a phase of fashioning remedial details where Congress has not spoken but left matters for judicial determination within the general framework of familiar legal principles. [citations] *Id.*, 327 U.S. at 395.

not time-barred, the district court denied respondents' motions to dismiss. (*id.* at 61a).

2. *The Decision of the Court of Appeals*

Upon respondents' application, the district court certified its ruling for interlocutory appeal pursuant to 28 U.S.C. §1292(b), and the Court of Appeals for the Third Circuit granted the petition.

Sitting *en banc*, the court of appeals reversed the order of the district court on April 8, 1988. *In re Data Access Systems Securities Litigation*, 843 F.2d 1537, App. A, *infra*, p. 1a. Overturning its own precedents, the court of appeals formulated a limitations period for §10(b) securities fraud actions never before applied in federal jurisprudence. Under the decision of the court of appeals, the statute of limitations applicable to §10(b) actions is the "one-year/three year" limitations period set forth in Sections 9(e), 18(c), and 29(b) of the Securities Exchange Act. (App. A, *infra*, pp. 21a-22a). The new limitations period requires that a securities fraud action be commenced within one year of discovery of the fraud, and at the outside within three years after the fraud occurs. (*id.* at 32a). Under the court of appeals' decision the three-year period cannot be extended, even when (as occurred in this case) defendants' fraudulent conduct remains undetected until the three-year period has expired. (*id.* at 22a-23a, 32a).

The court of appeals reached its decision to apply a federal limitations period to §10(b)'s implied right

of action despite its acknowledgement that under the settled teachings of this Court it "must borrow a state statute." (*id.* at 20a). See, *e.g.*, *Wilson v. Garcia*, 471 U.S. 261, 266 (1985) ("When Congress has not established a time limitation for a federal cause of action, the settled practice has been to adopt a local time limitation as federal law"). The court of appeals applied a limitations period drawn from a federal statute to petitioner's §10(b) claims because, in its view, "state statutes of limitations are an unsatisfactory vehicle for the enforcement of" §10(b). (App. A, *infra*, p. 20a).

Despite the fact that a §10(b) claim sounds in fraud, the court of appeals held that its new, federal "one year/three year" limitations period cannot be tolled, even where (as in this case) respondents' involvement in the fraud remained undetected, despite petitioner's discovery efforts, until the limitations period had expired (*id.* at 32a):

> Accordingly, we have decided that the proper period of limitations for a complaint charging violations of Section 10(b) and Rule 10b-5 is one year after the plaintiff discovers the facts constituting the violation, and *in no event more than three years after such violation.* (emphasis added).

REASONS FOR GRANTING THE WRIT

Introduction

The court of appeals decided two issues in this case. First, it held that instead of applying a state statute of limitations to a claim brought pursuant to Section 10(b) of the Securities Exchange Act of 1934, it would apply a federal, one-year/three year statute of limitations. Second, it held that no tolling of the limitations period would be permitted in this Section 10(b) fraud action. Both holdings contravene explicit rulings of this Court and both holdings create clear conflicts among the circuits. In fact, every court of appeals has ruled on both these issues, holding exactly the opposite to the holdings of the decision below.

The Court is, of course, aware of the crucial role that private actions under §10(b) and Rule 10b-5 play in enforcement of the federal securities laws. Just this Term the Court reemphasized that "a private cause of action . . . for a violation of §10(b) and Rule 10b-5 . . . constitutes an essential tool for enforcement of the 1934 Act's requirements." *Basic, Inc. v. Levinson,* No. 86-279 (March 7, 1988), Slip Op. 6. In adopting in *Basic, Inc. v. Levinson* the "fraud-on-the-market" presumption of reliance for §10(b) class actions, the Court likewise reminded us of the vital role that class actions like the case at bar play in enforcing the antifraud provisions of the securities laws. *Id.*, Slip Op. 16-19.

No question may be more important to the maintenance of a cause of action than the statute of limitations applicable thereto. Since venue is national in securities fraud class actions, the decision below, which fixes the limitations period for a §10(b) action as one year after discovery and a maximum of three years after occurrence, has significant practical implications for the conduct of private securities fraud class actions throughout the United States. Moreover, the *en banc* decision below is not confined to private litigation. To the contrary, it sets an inalterable limitations period for §10(b) enforcement actions brought throughout the Third Circuit by the Securities and Exchange Commission, a development that cannot but impede the government's ability to mount effective investigations of and lawsuits against violators of the nation's securities laws.

The question of the proper limitations period for the implied right of action under §10(b) is important and recurring. Until the decision below, every court of appeals followed this Court's rulings and applied a limitations period drawn from state law. The courts of appeals often applied differing state limitations periods — some courts applied the forum state's Blue Sky limitations period, while other courts applied the forum state's limitations period for common law fraud or for another closely analogous state cause of action. See, *e.g.*, *Norris v. Wirtz*, 818 F.2d 1329, 1331-33 (7th Cir. 1987). But

the decision below, which applies a limitations period drawn directly from federal statutory law, is inconsistent with this Court's precedents that require application of a *state* limitations period, and conflicts with the decisions of every other court of appeals on the question.

As importantly, in issuing its decision prohibiting tolling of the newly fashioned one-year/three year limitations period in cases of securities fraud, the court of appeals failed to adhere to this Court's precedents that "read into every federal statute of limitation" the equitable doctrine of fraudulent concealment. *Holmberg v. Armbrecht*, 327 U.S. 392, 397 (1946). For over a century this Court has required that a tolling provision be appended to all limitations periods applicable to lawsuits sounding in fraud, to the end that "no man may take advantage of his own wrong." *Glus v. Brooklyn Eastern District Terminal*, 359 U.S. 231, 232 (1959). Since securities fraud, like all fraud, is by its nature self-concealing, the fraudulent concealment doctrine has been universally invoked to toll the running of the applicable limitations period until the victim of the fraud discovers (or with the exercise of reasonable diligence should have discovered) his status. The decision below, however, refused to suspend the running of its newly created limitations period, holding that a §10(b) suit may under no circumstances be commenced more than three years after the fraud occurs. (App. A, *infra*, p. 32a). The erroneous prohibition against tolling adopted by the

court below creates a conflict on this point with every other court of appeals, and its resolution of the issue is inconsistent with this Court's precedents that require tolling in cases of fraud.

A. State Limitations Periods are Required for §10(b) Actions

1. The court of appeals acknowledged that under the settled precedents of this Court it "must borrow a state statute" of limitations for the implied private right of action under §10(b). (App. A, *infra*, p. 20). Nevertheless, rejecting both state common law and state statutory law, the court below concluded that "it would seem bizarre if not anomalous to go beyond the express statutes of limitations contained in provisions of the 1934 Act." (*id.* at 30a). To impose uniformity and eradicate what it perceived as the confusion and difficulty created by the use of state limitations periods, the court of appeals applied a single, "one year/three year" limitations period, which it drew from Sections 9(e), 18(c), and 29(b) of the Securities Exchange Act. (*id.* at 32a).[5]

But by its desire to append "a uniform federal statute of limitations" to the private right of action implied under §10(b) (App. A, *infra*, p. 29a), the

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[5] It should be noted that the language relating to the limitations periods in Sections 9(e), 18(c), and 29(b) of the Exchange Act is not the same. However, the decision below did not discuss these differences but, referring to all three sections as though they were one, simply adopted a "one year/three year" statute of limitations.

court below failed to adhere to this Court's precedents that require adoption of a *state* limitations period for securities fraud lawsuits. Nothing in federal law or policy requires that all §10(b) actions be governed by a single, invariable limitations period. To the contrary, this Court's long-standing rule is that when a federal statute contains no limitations period, a court should apply a limitations period drawn from state law. This Court has held that "[t]he implied absorption of state statutes of limitation within the interstices of the federal enactments is a phase of fashioning remedial details where Congress has not spoken but left matters for judicial determination within the general framework of familiar legal principles." *Holmberg v. Armbrecht*, 327 F.2d 392, 395 (1946). See also *Cope v. Anderson*, 331 U.S. 461, 463 (1947) (National Bank Act); *O'Sullivan v. Felix*, 233 U.S. 318, 322 (1914) (Civil Rights Act of 1870); *Chattanooga Foundry & Pipe Works v. City of Atlanta*, 203 U.S. 390, 397 (1906) (Sherman Act); *McClaine v. Rankin*, 197 U.S. 154, 158 (1905); *McCluny v. Silliman*, 3 Pet. 270, 276-77 (1830).

Contrary to the view of the court of appeals that application of a state limitations period to a federal statute affecting the national economy is "bizarre" and "anomalous" (App. A, *infra*, p. 30a), it is settled that the limitations period applicable to lawsuits involving federal statutes of substantial economic importance is that of the state in which the district court sits. Although this rule may produce differing

limitations periods for identical actions brought in different district courts, that has never been cause to change it. See *Auto Workers v. Hoosier Corp.*, 383 U.S. 696, 703-04 (1966) (breach of contract action under §301 of Labor Management Relations Act); *Cope v. Anderson*, 331 U.S. 461, 463 (1947) (National Bank Act); *Campbell v. Haverhill*, 155 U.S. 610, 617 (1895) (Patent Act).[6] The rule is not limited to statutes touching the national economy, but is equally applicable to, *inter alia*, actions brought pursuant to the federal civil rights acts, which might otherwise seem to require absolute national uniformity. See, *e.g.*, *Wilson v. Garcia*, 471 U.S. 261 (1985) (§1983 civil rights action governed by state, not federal limitations period); *Board of Regents v. Tomanio*, 446 U.S. 478, 483-86, 489 (1980) (§1983 limitations period includes adoption of state, not federal tolling rules); *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 462 (1975) (§1981 action governed by state, not federal limitations period).

The court of appeals was led into error by its desire to create a limitations period for §10(b) actions "that would be uniform throughout our

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[6] In *Auto Workers v. Hoosier Corp.*, 383 U.S. at 703-04, this Court stated:

> As early as 1830, this Court held that state statutes of limitations govern the timeliness of federal causes of action unless Congress has specifically provided otherwise. . . . Since that time, state statutes have repeatedly supplied the periods of limitations for federal causes of actions when federal legislation has been silent on the question.

nation's commercial universe, instead of being subjected to the vagaries of independent and diverse state statutory regulations." (App. A, *infra*, p. 28a). In attempting to fashion such a "uniform" limitations period it overreached itself and failed to adhere to the precedents of this Court that require application of a state limitations period where none is supplied by federal law. Among those precedents is this Court's decision in *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 210 n.29 (1976), which states: "[s]ince no statute of limitations is provided for civil actions under §10(b) [of the Securities Exchange Act], *the law of limitations of the forum State is followed* as in other cases of judicially implied remedies." (emphasis added). The court below erred in misreading this language to support its view that "the Supreme Court has yet to rule on the applicable limitations period for a section 10(b) and Rule 10b-5 action." (App. A, *infra*, p. 7a).

The court of appeals believed that "[t]he necessity for uniform federal remedies in securities cases would seem to demand recourse to a uniform federal statute of limitations." (*id.* at 28a-29a). But the decision below finds no support in the Court's recent decisions to which the court of appeals referred as giving "strong signals" (App. A, *infra*, p. 27a) that a uniform limitations period should be adopted. See *Wilson v. Garcia*, 471 U.S. 261 (1985) (§1983 civil rights action); *DelCostello v. Internat'l Brotherhood of Teamsters*, 462 U.S. 151, 171-72 (1983) (fair

representation claim under §301 of Labor Management Relations Act); *Agency Holding Corp. v. Malley-Duff & Associates*, No. 86-497 (June 22, 1987), Slip Op. 13 (RICO limitations period). In *Wilson v. Garcia*, in fact, the Court rejected application of a uniform national limitations period and directed the district courts to apply the personal injury limitations periods of the states in which they sit. In *DelCostello* the Court applied a uniform federal statute only after it expressly determined that application of a 90-day state limitations period would "frustrate or interfere with the implementation of national [labor] policies" (*id.*, 462 U.S. at 161) and rejected the limitations period supplied by state law *because it was too short*. 462 U.S. at 166-67.[7] Thus the Court adopted a six-month *federal* limitations period to avoid the "too-short time in which an employee could sue his employer under borrowed state law." *Id.*, 462 U.S. at 167. And in *Agency Holding* the Court recognized that the RICO statute is *sui generis*, and adopted the Clayton Act's 4-year limitations period for civil RICO claims to eliminate the problem of selecting state limitations periods for the dozens of RICO predicate offenses that span the gamut of criminal and tort law. Slip

[7] The Court stated: "[S]tate arbitration statutes typically provide very short times in which to sue for vacation of arbitration awards. . . . . We conclude that state limitations periods for vacating arbitration awards fail to provide an aggrieved employee with a satisfactory opportunity to vindicate his rights under §301 and the fair representation doctrine." 462 U.S. at 166.

Op. 6. Thus, even while applying a federal statute in *DelCostello* and *Agency Holding*, the Court pointedly reminded us of the rule that "resort to state law remains the norm for borrowing of limitations periods." *DelCostello*, 462 U.S. at 171; *Agency Holding*, Slip Op. 4 ("Given our longstanding practice of borrowing state law, and the congressional awareness of this practice, we can generally assume that Congress intends by its silence that we borrow state law.")

Contrary to the court of appeals' perception, use of state limitations periods for §10(b) actions has not frustrated or interfered with the vigorous enforcement of the antifraud provisions of the federal securities laws upon which this Court and Congress have long insisted. See *e.g.*, *Basic, Inc. v. Levinson*, No. 86-279 (March 7, 1988), Slip Op. 6, 20. No need has arisen for imposition of a single, national limitations period to govern §10(b) litigation — but if there has, it ought to be provided by this Court or by Congress, not by a court of appeals. *Norris v. Wirtz*, 818 F.2d at 1332; *Roberts v. Magnetic Metals Co.*, 611 F.2d 450, 454 (3d Cir. 1979). The court below was led into error by its overly broad reading of this Court's decisions in *DelCostello* and *Agency Holding*, which it misperceived as bestowing license to depart from the precedents of this Court that require that a state rather than a federal limitations period be borrowed. (App. A, *infra*, p. 31a). The court of appeals was led astray by its clear misreading of this Court's decision in *Hochfelder*, combined

with its desire to create an invariable national limitations period for §10(b) actions. Review of the decision below is warranted to correct the court of appeals' failure to adhere to this Court's precedents that require borrowing limitations periods from state law in the context of the implied right of action under §10(b).

2. The *en banc* decision of the court of appeals has created a conflict among the circuits on the question of whether to draw upon state or federal law for the limitations period governing §10(b) actions. Until the decision below, all the courts of appeals followed *Ernst & Ernst v. Hochfelder*, 425 U.S. 185 (1976), and applied "the law of limitations of the forum state." *Id.*, 425 U.S. at 210 n.29. See *Cook v. Avien, Inc.*, 573 F.2d 685, 694 (1st Cir. 1978) (state statute of limitations for personal tort suits); *Armstrong v. McAlpin*, 699 F.2d 79, 86-87 (2d Cir. 1983) (state common law fraud statute of limitations); *O'Hara v. Kovens*, 625 F.2d 15, 17 (4th Cir. 1980) (state Blue Sky statute of limitations); *Breen v. Centex Corp.*, 695 F.2d 907, 910-11 (5th Cir. 1983) (state common law fraud statute of limitations); *Marx v. Centran Corp.*, 747 F.2d 1536, 1551 (6th Cir. 1984) (state "catch-all" statute of limitations); *Andrews v. Heinold Commodities, Inc.*, 771 F.2d 184, 186 (7th Cir. 1985) (state Blue Sky statute of limitations); *Morris v. Stifel, Nicolaus & Co., Inc.*, 600 F.2d 139, 146 (8th Cir. 1979) (state Blue Sky statute of limitations); *Vucinich v. Paine, Webber, Jackson & Curtis, Inc.*, 739 F.2d 1434, 1436 (9th Cir. 1984)

(state common law fraud statute of limitations); *Loveridge v. Dreagoux*, 678 F.2d 870, 874 (10th Cir. 1983) (state common law fraud statute of limitations); *Friedlander v. Troutman, Sanders, Lockerman & Ashmore*, 788 F.2d 1500, 1509 (11th Cir. 1986) (state Blue Sky statute of limitations); *Forrestal Village, Inc. v. Graham*, 551 F.2d 411, 413 (D.C. Cir. 1977) (Blue Sky limitations period).

Disagreement may exist among the courts of appeals as to which state limitations period should be applicable to §10(b) actions, and to that extent the decision below exacerbates differences among the courts of appeals on the question. But until the decision below, *all* the courts of appeals agreed that the limitations period governing any §10(b) action must be drawn from state law. The court below disagreed, and its decision to utilize a federal rather than a state limitations period has created a conflict among the circuits on the issue. Because the decision below was rendered *en banc*, the conflict is irreparable, and review by this Court is warranted.

B. Tolling is Required in Cases of Fraud

1. In an unbroken line of cases decided over the past 113 years, this Court has consistently and without deviation required that equitable tolling be read into all limitations periods governing causes of action sounding in fraud. This in itself is not surprising, since by its very nature fraud in all its forms is self-concealing. Its victims by definition are unaware of their status when the fraud is committed,

and remain in ignorance as long as its perpetrators can conceal their wrongdoing. Tolling the applicable statute of limitations is thus the only mechanism by which a cause of action to redress the injury can be preserved. As this Court explained over a century ago, "[t]o hold that by concealing a fraud, or by committing a fraud in a manner that it concealed itself until such time as the party committing the fraud could plead the statute of limitations to protect it, is to make the law which was designed to prevent fraud the means by which it is made successful and secure." *Bailey v. Glover*, 88 U.S. 342, 349 (1875). In *Exploration Co. v. United States*, 247 U.S. 435, 449 (1918), this Court reaffirmed "the rule . . . that statutes of limitations to set aside fraudulent transactions shall not begin to run until the discovery of the fraud." More recently, in *Holmberg v. Armbrecht*, 327 U.S. 392, 397 (1946), the Court again had occasion to hold that "the old chancery rule" of equitable tolling "is read into every federal statute of limitations."

"Statutes of limitations are primarily designed to assure fairness to defendants." *Burnett v. New York Central R.R.*, 380 U.S. 424, 428 (1965). Prompted by "considerations deeply rooted in our jurisprudence," "in cases where the plaintiff has refrained from commencing suit during the period of limitation because of inducement by the defendant, or because of fraudulent concealment, this Court has not hesitated to find the statutory period tolled or

suspended by the conduct of the defendant." *American Pipe & Construction Co. v. Utah*, 414 U.S. 538, 559 (1974). See *Board of Regents v. Tomanio*, 446 U.S. 478, 487-88 (1980).

The decision below squarely holds that "the proper period of limitations for a complaint charging violation of section 10(b) and Rule 10b-5 is . . . in no event more than three years after [the] violation." (App. A, *infra*, p. 32a). This is error. In failing to adhere to this Court's precedents that tolling is mandatory in all cases of fraud, the court of appeals created an unwarranted exception to the "universal rule" (*Exploration Co. v. United States*, 247 U.S. at 449) that tolling is read into every limitations period governing claims that sound in fraud.

The practical effect of the decision below will be to encourage securities law violators to conceal their wrongdoing for the period of time required to extinguish all civil §10(b) claims that would otherwise be brought against them. Such concealment is often not difficult, since the perpetrators of stock fraud schemes are likely to be skilled and highly motivated businessmen with exclusive knowledge of the facts surrounding their conduct, while their victims are public shareholders and investors who in ignorance of the fraud have relied on the integrity of the price of their stock set by the workings of the impersonal securities market. See *Basic, Inc. v. Levinson*, Slip Op. 20.

Likewise, imposition of an absolute three-year cut-off of the right to sue under §10(b), as required

by the decision below, flies in the face of what the Court this Term again recognized as "the Congressional policy embodied in the 1934 Act" of "facilitating Rule 10b-5 litigation." *Basic, Inc. v. Levinson*, Slip Op. 20. Contrary to "the congressional policy favoring private suits as an important mode of enforcing federal securities statutes" (*Pinter v. Dahl*, No. 86-805 (June 15, 1988), Slip Op. 9), what the decision below promises to achieve is stultification of Rule 10b-5 litigation and absolute immunity from suit, from both private plaintiffs and from the Securities and Exchange Commission, for all who successfully conceal their fraud for three years.

Review of the decision below is warranted to correct the court of appeals' failure to adhere to this Court's precedents on the question of tolling, as well as to repair the damage to both private and governmental securities enforcement efforts created by the decision, which promises to reward fraudulent conduct by immunizing it from challenge if it can be concealed until expiration of the three-year outer limitations period created by the decision in this case.

2. Until the decision below, the law in every circuit was that the running of the limitations period applicable to §10(b) securities fraud actions must be suspended until the fraud is, or with the exercise of reasonable diligence should have been discovered. *Holmes v. Bateson*, 583 F.2d 542, 561 (1st Cir. 1978); *Klein v. Shields & Company*, 470 F.2d 1344,

1346 (2d Cir. 1972); *Tobacco & Allied Stocks, Inc. v. Transamerica Corp.*, 244 F.2d 902, 903 (3d Cir. 1957); *Newman v. Prior*, 518 F.2d 97, 100 (4th Cir. 1975); *Breen v. Centex Corp.*, 695 F.2d 907, 911 (5th Cir. 1983); *Herm v. Stafford*, 663 F.2d 669, 682 (6th Cir. 1981); *Sperry v. Barggren*, 523 F.2d 708, 710 (7th Cir. 1975); *Harris v. Union Electric Co.*, 787 F.2d 355, 360 (8th Cir. 1986); *Volk v. D.A. Davidson & Co.*, 816 F.2d 1406, 1412 (9th Cir. 1987); *State of Ohio v. Peterson, Lowry, Rall, Barber & Ross*, 651 F.2d 687, 691-92 (10th Cir. 1981); *Kennedy v. Tallant*, 710 F.2d 711, 716 (11th Cir. 1983); *Wachovia Bank & Trust Co. v. Nat'l Student Marketing Corp.*, 650 F.2d 342, 349 (D.C. Cir. 1980). The courts of appeals' unanimous adherence to this principle stemmed from this Court's insistence on suspending the limitations period for victims of a fraudulent scheme until their discovery of the fraudulent conduct, a rule that safeguards against the possibility that wrongdoers will escape the consequences of their actions by concealing their fraud until the statute of limitations has run.

The court below did not acknowledge this Court's precedents applying this "universal rule." *Exploration Co. v. United States*, 247 U.S. at 449. Nor did it acknowledge that its decision has created a conflict among the circuits on the point. Instead, without discussion or analysis, it held that its newly created "one year/three year" limitations period for §10(b) claims is "absolute" and not subject to tolling. (App. A, *infra*, pp. 23a, 32a).

Review of the decision below is warranted because the conflict between the Third Circuit and all other circuits on the question of tolling cannot otherwise be resolved. The court of appeals' *en banc* decision in this case is not subject to alteration. A decision by this Court on the question of tolling is therefore necessary to resolve the otherwise irreparable conflict among the circuits that has been created by the decision below.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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June 29, 1988

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 87-5205, 87-5385

In Re: DATA ACCESS SYSTEMS SECURITIES LITIGATION

Tolins & Lowenfels & Roger A. Tolins
Appellants (No. 87-5205)

I. Kahlowsky and Co. and Peter Cunicelli
Appellants (No. 87-5385)

Appeal from the United States District Court
for the District of New Jersey - Camden
(D.C. Civil No. 81-1923)

Argued
November 19, 1987
Before: SEITZ, HUTCHINSON, and ALDISERT,
Circuit Judges.

Reargued in banc
March 8, 1988
Before: GIBBONS, Chief Judge and
SEITZ, WEIS, HIGGINBOTHAM, SLOVITER,
BECKER, MANSMANN, GREENBERG, HUTCHINSON,
SCIRICA and ALDISERT, *Circuit Judges.*

(Opinion Filed: April 8, 1988)

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OPINION OF THE COURT

ALDISERT, *Circuit Judge.*

We visit again the troublesome question presented in *Biggans v. Bache Halsey Stuart Shields, Inc.*, 638 F.2d 605 (3d Cir. 1980), and *Roberts v. Magnetic Metals Co.*, 611 F.2d 450 (3d Cir. 1979), to determine the applicable limitations period for complaints charging violations of section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), and Rule 10b-5 promulgated thereunder by the Securities and Exchange Commission, 17 C.F.R. § 240.10b-5 (1987). We are required to decide two important issues: whether subsequent Supreme Court decisions in *Agency Holding Corp. v. Malley-Duff & Assocs., Inc.*, ___ U.S. ___ (55 U.S.L.W. 4952, June 22, 1987), *Wilson v. Garcia*, 471 U.S. 261 (1985), and *DelCostello v. International Bhd. of Teamsters*, 462 U.S. 151 (1983), and our decision in *Malley-Duff & Assocs., Inc. v. Crown Life Ins. Co.*, 792 F.2d 341 (3d Cir. 1986), *aff'd sub nom. Agency Holding Corp. v. Malley-Duff & Assocs., Inc., supra*, require us to re-examine both the reasoning and holdings in *Biggans* and *Roberts*; if so, we must determine the proper limitations period. We may make this re-examination freely and without constraint of panel precedents because we are assembled in a court in banc.

The district court determined that the limitations period for this case should be borrowed from New Jersey's six-year statute encompassing common law fraud actions. N.J.S.A. § 2A:14-1. Contending that the shorter, two-year statute of limitations under New Jersey's blue sky law, N.J.S.A. § 49:3-71, should apply, the defendants successfully moved for certification of

the district court's determination pursuant to 28 U.S.C. § 1292(b). The court stayed its proceedings pending review by us. The defendants subsequently filed a petition for review with this court, which was granted on March 23, 1987. Jurisdiction was proper in the district court based on 15 U.S.C. § 78aa, 28 U.S.C. § 1331, as the case involves claims under section 10(b) of the 1934 Act and Rule 10b-5. We have jurisdiction under 28 U.S.C. § 1292(b).

I.

This certified class-action lawsuit was brought on behalf of those who purchased common stock of Data Access Systems, Inc. from October 31, 1978, through June 22, 1981. These shareholders filed their initial complaint on June 23, 1981, immediately following certain public disclosures of fraudulent business and stock trading activities involving Data Access. On October 29, 1981, the Securities and Exchange Commission filed a complaint seeking injunctive and other relief against Data Access, related companies, and several individuals alleging that they violated federal securities laws. Data Access subsequently filed for protection under Chapter 11 of the federal bankruptcy code.

The plaintiffs proceeded to file second and third amended complaints. The case at hand relates to the third amended complaint, which named the defendants relevant to the present appeal: Roger Tolins, a New York attorney; Tolins & Lowenfels, his law firm; Peter Cunicelli, an accountant; and I. Kahlowsky, Cunicelli's accounting firm. The third amended complaint stated that Data Access retained Tolins and his firm to represent the company in connection with a February 1979 public offering and to assist it in preparing and filing Form 10-Ks for fiscal years ending August 31, 1978, 1979, and 1980. The

plaintiffs alleged that in the registration statement and Form 10-Ks, Data Access represented, in language drafted by Tolins, that it had no potential liability in connection with certain "sales" to its "affiliated" companies, Mark Serv Co., Transnet Corp., and Olympic International Leasing Co. Mark Serv is a partnership owned by, *inter alia*, certain officers, shareholders, and associated persons of Data Access.

The plaintiffs contend that Tolins and his firm knew or reasonably should have known that the representations contained in the prospectus and Form 10-Ks were materially inaccurate, because they represented that Data Access had no ongoing liabilities in connection with the cluster transactions between the company and its affiliates. The complaint alleged that Tolins ignored or disregarded clear evidence that such representations were false, and further stated that Attorney Tolins participated in, aided and abetted, and conspired with the principals of Data Access and others to defraud the shareholder-plaintiffs. Plaintiffs alleged that Tolins and his firm violated section 10(b) of the 1934 Act and Rule 10b-5, and committed common law fraud and negligence.

The third amended complaint also named as defendants Cunicelli and his accounting firm, who were auditors for Mark Serv. The complaint noted that Touche Ross & Co., Data Access' auditors, requested Cunicelli and his company to provide information concerning Mark Serv's business dealings with Data Access. In response, "Kahlowsky and Cunicelli advised Touche Ross, *inter alia*, that there were no liabilities and guarantees on the part of [Data Access] to the Mark Serv lending banks, and that said banks were not relying upon [Data Access] or upon any obligation undertaken by [Data Access] as security for their loans to Mark Serv." App at Vol. I, 183a. Plaintiffs contend that when Cunicelli and I. Kahlowsky made their

representations to Touche Ross, they knew that Data Access was contingently liable to the Mark Serv lending banks. The complaint stated that Cunicelli and Kahlowsky fraudulently and recklessly misrepresented and failed to disclose to Touche Ross the material facts with respect to Data Access' obligations to Mark Serv and to Mark Serv's lending banks; it alleged that the accountants participated in, aided and abetted, and conspired with the principals of Data Access and others to defraud the shareholder-plaintiffs. Here too, plaintiffs allege that the accountant appellants violated section 10(b) of the 1934 Act and Rule 10-5, and committed common law fraud and negligence.

II.

Because this appeal involves the selection, interpretation, and application of legal precepts, the standard of review is plenary. *Dent v. Cunningham*, 786 F.2d 173, 175 (3d Cir. 1986). The scope of this court's review is generally governed by the controlling questions of law set forth in the district court's certification order under 28 U.S.C. § 1292(b). *Akerly v. Red Barn Sys., Inc.*, 551 F.2d 539, 543 (3d Cir. 1977). However, this court may consider all grounds that might require reversal of the order appealed from. *Merican, Inc. v. Caterpillar Tractor Co.*, 713 F.2d 958, 962 n.7 (3d Cir. 1983), *cert. denied*, 465 U.S. 1024 (1984).

The district court certified two questions for review pursuant to section 1292(b):

> a) For the statute of limitations found in the New Jersey Blue Sky law to apply to plaintiffs' security claims herein, need plaintiffs' claims state a viable cause of action under said blue sky law?
>
> b) If the answer to the foregoing question is in the affirmative, does plaintiffs' Third Considered

> Amended Class Action Complaint, alleging that defendants substantially participated and/or aided and abetted in the sale of securities to plaintiffs, state a viable cause of action against defendants as "sellers" under the applicable liability provision of the New Jersey Blue Sky law?

App. at 225. (Technically speaking, the district court certified three questions. Because the wording of the second question embraces both the issues and parties in the third question, we proceed as if the court certified two questions.)

Depending upon our answers to these questions, we are required to affirm or reverse the district court's determination as to the limitations period. The first certified question squarely presents us with occasion to consider the effect of the subsequent Supreme Court decisions in *Malley-Duff*, *Wilson*, and *DelCostello* on our holdings in *Biggans* and *Roberts*. The second certified question asks whether plaintiffs' allegations against the defendant accountants and lawyers state a claim under New Jersey's blue sky law, and therefore are governed by the statute of limitations set forth in that law. Our approach to the second question will depend upon our answer to the first.

III.

At the outset we recognize that the Supreme Court has yet to rule on the applicable limitations period for a section 10(b) and Rule 10b-5 action. *See Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 210 n.29 (1976); *Roberts v. Magnetic Metals Co.*, 611 F.2d 450, 461 (3d Cir. 1979) (Seitz, C.J., dissenting). The absence of a uniform limitations period in such actions has been described by Judge Easterbrook as "one tottering parapet of a ramshackle edifice. Deciding what features of state periods of limitation to adopt for which federal statutes wastes untold hours." *Norris v.*

Wirtz, 818 F.2d 1329, 1332 (7th Cir.), *cert. denied*, 108 S. Ct. 329 (1987). Judge Easterbrook has lamented:

> Never has the process been more enervating than in securities law. There are many potentially analogous state statutes, with variations for different kinds of securities offenses and different circumstances that might toll the period of limitations. Both the bar and scholars have found the subject vexing and have pleaded, with a unanimity rare in the law, for help. E.g., Louis Loss, *Fundamentals of Securities Regulation* 1164-75 (1983); Thomas Lee Hazen, *The Law of Securities Regulation* § 13.8 & n.2 (1985) (collecting authority); *Report of the Task Force on Statute of Limitations for Implied Actions*, 41 Bus.Law. 645 (1986). As the ABA's Committee on Federal Regulation of Securities observed, *id.* at 646-47, 656-57, the courts of appeals disagree on every possible question about limitations periods in securities cases. Only Congress or the Supreme Court can bring uniformity and predictability to this field[.]

Id. Yet we first must review the reasoning and holdings of our court in *Biggans v. Bache Halsey Stuart Shields, Inc.*, 638 F.2d 605 (3d Cir. 1980), and *Roberts*, 611 F.2d 450.

We faced for the first time in *Roberts* the question now before us. There, a selling shareholder brought suit against a corporation, its merger partner, and their broker agent alleging that the defendants violated sections 10(b) and 14(a) of the Securities Exchange Act by making material misrepresentations and omissions in connection with the solicitation of shareholder approval of a merger. There were three opinions in the case. Two judges, in separate opinions, decided that

the suit was governed by the six-year statute of limitations that New Jersey applied to actions for common law fraud, and not by the two-year statute provided in New Jersey's blue sky law.

In *Roberts*, Judge Gibbons was of the view that in federal securities litigation, the absence of a federal statute of limitations required that we defer to the forum state's policy of repose. If the state court would entertain an action for the relief sought, no state policy of repose was implicated. The relevant inquiry under Judge Gibbons' analysis was whether the lawsuit would be time barred if brought in state court. Significantly, Judge Gibbons stated that "the Supreme Court has announced the rule that we must look not for an analogous federal limitations period, but for an analogous forum state limitations period. . . . Much can be said, perhaps, for a different rule in a different context directing a federal court to statutes of limitations governing analogous federal causes of action. But the rule has been otherwise for many years, and an inferior court is not free to change it." *Roberts*, 611 F.2d at 454. Judge Sloviter had a different approach. She stressed the need to identify the state statute of limitations that best comports with the policy behind the federal cause of action.

Writing in dissent, then Chief Judge Seitz expanded upon Judge Gibbons' reference to a federal statute of limitations. Noting that several commentators have argued that federal courts should look to the most analogous federal statute for a Rule 10b-5 limitations period, Chief Judge Seitz stated: "Were I writing on a clean slate, I would be inclined to adopt that approach. The Supreme Court, however, has rarely deviated from the normal rule of looking to state statutes." *Id.* Subsequent to the statements by Judge Gibbons and Chief Judge Seitz, the Supreme Court in *Agency Holding Corp. v. Malley-Duff &*

Assocs., Inc., ___ U.S. ___ (55 U.S.L.W. 4952, June 22, 1987), and *DelCostello v. International Bhd. of Teamsters*, 462 U.S. 151 (1983), did deviate. The Court directed us to apply the most analogous federal statute of limitations to certain federal causes of action.

Our court's latest position in section 10(b) and Rule 10b-5 cases, announced prior to *DelCostello*, *Wilson*, and *Malley-Duff*, was set forth in *Biggans v. Bache Halsey Stuart Shields, Inc.*, 638 F.2d 605, 610 (3d Cir. 1980):

> We therefore conclude that the reasoning which underlay the decision of this court to apply the New Jersey common law fraud statute of limitations in *Roberts* compels a similar result in this case. Where the state Blue Sky law does not provide the plaintiff with a cause of action for the relief requested, but common law does, and where the state legislature framed its statute to supplement, rather than supplant, available common law remedies, it is the common law limitations period which must be applied in federal securities actions.

In dissent, Judge Weis commented:

> The fact that the majority approach depends upon a detailed analysis of the underlying facts in the case at hand, as well as an uncertain prediction of state statutory interpretation, reveals the difficulties with utilizing an "exact match" approach. I believe it would be far preferable in a suit under § 10(b) of the Securities Act to look to the statute of limitations of the state's Blue Sky law. It not only furnishes a guidepost to the public, but gives some certainty to what is now a confused and inconsistent body of law.

Id. at 612 (Weis, J., dissenting). Judge Weis also expressed certain discomforts with case law then present in our court. He observed that because the plaintiff had alleged churning in securities practices, he was entitled to the state catch-all general fraud statute of limitations because the Pennsylvania blue sky statute provided no relief for such a private right of action. But had he based his claim on a sale to or purchase from another, then the one-year limitation of the state's securities law would apply because the Pennsylvania statute specifically authorized such a private right of action. "Even though both suits would be brought under Section 10(b), therefore, one would have to be filed within one year -- the other within two or six years. This continues the pattern of inconsistency begun in *Roberts*, where a seller of securities in New Jersey has six years to bring his suit under § 10(b), but a buyer presumably has only two years under the same statute. Thus, under this court's construction, no uniform statute of limitations for all Section 10(b) cases exists even within the same state." *Id.*

Our present case law calls for difficult interpretations of state limitations periods. We are required to examine each contention of a federal securities complaint with great particularity to determine whether the state blue sky statute tracks the particular federal claim, and if not, to determine claim-by-claim which other state limitations period will apply depending upon the resemblance between the precise federal claim and those based in state or common law actions. We are informed that our decisions have not provided bright-line guidance to our district courts in all section 10(b) and Rule 10b-5 cases. The district judge here said that "the Third Circuit has not settled the statute of limitations issue."

App. at 226a. Chief Judge Latchum, a veteran jurist extremely experienced in securities matters, has commented:

> Because of the narrow ground upon which both *Roberts* and *Biggans* were decided and the lack of a firm consensus as to the proper guidelines to be applied, it is difficult to predict what effect these opinions hold for the circumstances posed by the present complaint. Some limited guidance, however, can be extrapolated from the various opinions. It is safe to assume that the Third Circuit adheres to the rudimentary principle that when alternative limitations periods are supplied by state law, the court must select that state statute of limitations which best comports with the substantive federal policies advanced by Rule 10b-5. Likewise the Court of Appeals has indicated that the concurrent operation of the federal and state securities statutes makes the Blue Sky statute of limitations in most cases the logical candidate for regulating 10b-5 claims. This presumption, however, is subject to one significant exception. If the underlying state Blue Sky law does not afford a civil damage action to remedy the behavior challenged by the 10b-5 claim and the plaintiff would be relegated to a common law fraud action for state relief, the courts must apply the fraud limitations provision to the 10b-5 action. *Accord Sharp v. Coopers & Lybrand*, 649 F.2d 175, 191-92 (C.A.3, 1981); *McNeal v. Paine, Webber, Jackson & Curtis, Inc.*, 598 F.2d 888, 894 (C.A.5, 1979). Beyond these constraints, however, the district courts are free to fill the interstices left open by Congress' failure to enact a limitations provision for remedies implied under the securities laws.

Hill v. Der, 521 F. Supp. 1370, 1382-83 (D. Del. 1981).

It is against this backdrop that we examine the teachings contained in recent relevant Supreme Court opinions.

IV.

In *Agency Holding Corp. v. Malley-Duff & Assocs., Inc.*, ___ U.S. ___ (55 U.S.L.W. 4952, June 22, 1987), the Court provided us with a formula to approach our present problem. In *Malley-Duff*, the Court stated that "[a]lthough it has been suggested that federal courts always should apply the state statute of limitations most analogous to each individual case whenever a federal statute is silent on the proper limitations period, see *Wilson v. Garcia*, [471 U.S.] at 280 (dissent); *DelCostello v. Teamsters*, 462 U.S. 151, 174 (1983) (O'Connor, J., dissenting), *a clear majority of the Court [in DelCostello] rejected such a single path.*" ___ U.S. at ___, 55 U.S.L.W. at 4953 (emphasis added).

The Court then outlined the procedure to be followed in determining the appropriate statute of limitations for a federal claim. The first step involves characterizing the federal claim; this is generally a question of federal law. *Id.*; *see Wilson v. Garcia*, 471 U.S. 261, 269-70 (1985). In this initial step, we must determine whether all claims arising out of the federal statute should be characterized in the same way, or whether they should be evaluated differently depending upon the varying factual circumstances and legal theories presented in each individual case. *Malley-Duff*, ___ U.S. at ___, 55 U.S.L.W. at 4953; *see Wilson*, 471 U.S. at 268.

Once this characterization is made, the next inquiry is whether a federal or state statute of limitations should be used. The Supreme Court has held that the Rules of Decision Act, 28 U.S.C. § 1652, requires application of state statutes of limitations to

federal statutory actions not covered by an express limitations period unless "a timeliness rule drawn from elsewhere in federal law should be applied." *DelCostello v. International Bhd. of Teamsters*, 462 U.S. 151, 159 n.13 (1983). In some circumstances, the characterization of a federal claim has led the Court to conclude that "state statutes of limitations can be unsatisfactory vehicles for the enforcement of federal law. In those instances, it may be inappropriate to conclude that Congress would choose to adopt state rules at odds with the purpose or operation of federal substantive law." *DelCostello*, 462 U.S. at 161. The Court in *DelCostello* determined that when a rule from elsewhere in federal law clearly provides a closer analogy than available state statutes, and when federal policies at stake and the practicalities of litigation make that rule a significantly more appropriate vehicle for interstitial lawmaking, "we have not hesitated to turn away from state law." *Id.* at 171-72; *see also Malley-Duff*, ___ U.S. at ___, 55 U.S.L.W. at 4956 (four-year statute of limitations governing Clayton Act civil enforcement suits applies to RICO civil enforcement actions); *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355 (1977) (adopting federal statute of limitations for EEOC enforcement actions); *McAllister v. Magnolia Petroleum Co.*, 357 U.S. 221 (1958) (federal limitations period applied to unseaworthiness action under general admiralty law); *Holmberg v. Armbrecht*, 327 U.S. 392 (1946) (refusing to apply state limitations period to action to enforce federally created equitable right).

V.

This court has already recognized the necessity for establishing a uniform limitations period when we resort to "borrowing" state law. In *Malley-Duff & Assocs., Inc. v. Crown Life Ins. Co.*, 792 F.2d 341 (3d

Cir. 1986), *aff'd sub nom. Agency Holding Corp. v. Malley-Duff & Assocs., Inc.*, ___ U.S. ___ (55 U.S.L.W. 4592, June 22, 1987), one of the first "borrowing" cases in this court subsequent to *DelCostello* and *Wilson*, both the majority and concurring opinions rejected what Judge Weis had previously described as the "color-matching" or the claim-by-claim analysis followed by the majority opinion writers in *Biggans* and *Roberts*. It appears that this court, under the strong direction of the Supreme Court, has now heeded the instruction of *Wilson* that "'[f]ew areas of the law stand in greater need of firmly defined, easily applied rules than does the subject of periods of limitations.'" *Wilson*, 471 U.S. at 266 (quoting *Chardon v. Fumero Soto*, 462 U.S. 650, 667 (1983) (Rehnquist, J., dissenting)). We essentially concluded in *Crown Life* that this objective was not served by an approach whereby the limitations period for each federal claim would "depend upon the particular facts or precise legal theory of each claim." *Wilson*, 471 U.S. at 274. A factual, claim-based approach to characterizing the case for limitations purposes would not promote "[t]he federal interests in uniformity, certainty, and the minimization of unnecessary litigation." *Id.* at 275. Thus, speaking for the court in *Crown Life*, Judge Higginbotham stated:

> This case provides abundant evidence that a particularized approach to borrowing statutes of limitations "inevitably breeds uncertainty and time-consuming litigation." Even RICO claims based on "garden variety" business disputes might be analogized to breach of contract, fraud, conversion, tortious interference with business relations, misappropriation of trade secrets, unfair competition, usury, disparagement, etc., with a multiplicity of applicable limitations periods. A

> state may even have different limitations periods for common law fraud and securities fraud. . . . More extreme cases might include allegations sounding in assault, battery, false imprisonment, infliction of emotional distress, abuse of process, or trespass to land or chattels. The fact that RICO requires at least two predicate acts in all cases makes it even more likely that more than one analogy will have force in a given case. "The current approach is virtually guaranteed to incite complex and expensive litigation over what should be a straightforward matter."

Crown Life, 792 F.2d at 348-49 (footnote omitted) (quoting A.B.A. Section of Corporation, Banking and Business Law, *Report of the Ad Hoc Civil RICO Task Force* 391-92 (1985)).

We believe that the case-by-case approach utilized by the majority opinion writers in *Biggans* and *Roberts* must be modified if we are to be consistent with the later Supreme Court decisions in *DelCostello*, *Wilson*, and *Malley-Duff*. *See also Goodman v. Lukens Steel Co.*, 777 F.2d 113, 119-20 (3d Cir. 1985) (court, applying *Wilson*, adopts uniform statute of limitations for actions brought under 42 U.S.C. § 1981), *aff'd*, ___ U.S. ___ (55 U.S.L.W. 4881, June 19, 1987).

We are impressed by the approach taken by Judge Higginbotham in *Crown Life*. If we adopted the same reasoning in section 10(b) and Rule 10b-5 cases, we would minimize "uncertainty and time-consuming litigation." *Crown Life*, 792 F.2d at 348. Just as civil RICO is similar to actions under 42 U.S.C. § 1983 in that both encompass numerous and diverse topics and subtopics, so does section 10(b) and Rule 10b-5 embrace a galaxy of actions. Some of these actions are brought by securities purchasers. *Diamond v. LaMotte*, 709 F.2d 1419 (11th Cir. 1983); *Herm v. Stafford*, 663 F.2d 669 (6th Cir. 1981); *White v.*

Sanders. 650 F.2d 627 (5th Cir. 1981); *Sharp v. Coopers & Lybrand*. 649 F.2d 175. 191-92 (3d Cir.). *cert. denied*. 455 U.S. 938 (1981); *see Friedlander v. Troutman. Sanders. Lockerman*. 788 F.2d 1500. 1504-05 (11th Cir. 1986); *Landy v. FDIC*. 486 F.2d 139. 156-57 (3d Cir. 1973). *cert. denied*. 416 U.S. 960 (1974). Others are brought by sellers of securities. *Roberts*. 611 F.2d at 452-53; *see Blue Chip Stamps v. Manor Drug Stores*. 421 U.S. 723. 731-32 (1975) (plaintiff class for purposes of section 10(b) and Rule 10b-5 private damage actions is limited to purchasers and sellers of securities). *See generally* A. Bromberg. *Securities Law: Fraud -- SEC Rule 10b-5* § 2.3 (800). at 26 (1973); Schulman. *Statutes of Limitations in 10b-5 Actions*. 13 Wayne L. Rev. 635. 646 (1967). Some of the sellers' actions do not come within the ambit of state blue sky laws. because these laws often apply only to purchasers of securities. *Roberts*. 611 F.2d at 453. or do not allow recovery of damages by the plaintiffs involved. *See Biggans*. 638 F.2d at 610; *see generally Report of the Task Force on Statute of Limitations for Implied Actions*. 41 Bus. Law. 645. 652 (1986). In the current action. certain shareholders brought suit against the attorneys and accountants of a corporate seller of securities; there is a substantial question whether New Jersey's blue sky law creates liability for non-sellers in these circumstances. *See* N.J.S.A. §§ 49:3-71(a)(2); 49:3-71(b).

We therefore conclude that the case law in this court now suggests in section 10(b) and Rule 10b-5 actions the same determination it made in RICO cases: the courts must select "the *one* most appropriate statute of limitations for *all* civil [section 10(b) and Rule 10b-5] claims." *Crown Life*. 792 F.2d at 349; *see Friedlander*. 788 F.2d at 1505 (adopting a uniform limitations period for all sections 10(b) and Rule 10b-5 claims).

VI.

In looking for "the *one* most appropriate statute," we must not make the error of equating private rights of actions under section 10(b) and Rule 10b-5 with available common law fraud actions. The Supreme Court instructs that section 10(b) and Rule 10b-5 actions and common law fraud suits are two distinct breeds. Thus, the Court has refused to impose in the section 10(b) schema the traditional common law requirement in state fraud proceedings that plaintiffs establish their case by clear and convincing evidence. *Herman & MacLean v. Huddleston*, 459 U.S. 375, 390 (1983). "Reference to common-law practices can be misleading, . . . since the historical considerations underlying the imposition of a higher standard of proof have questionable pertinence here." *Id.* at 388; *see Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 744-45 (1975) ("[T]he typical fact situation in which the classic tort of misrepresentation and deceit evolved was light years away from the world of commercial transactions to which Rule 10b-5 is applicable.").

Moreover, the antifraud provisions of the securities laws are not coextensive with common law doctrines of fraud. "Indeed, an important purpose of the federal securities statutes was to rectify perceived deficiencies in the available common-law protections by establishing higher standards of conduct in the securities industry." *Huddleston*, 459 U.S. at 389; *see Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 203 (1976); *McClure v. Borne Chemical Co.*, 292 F.2d 824, 834 (3d Cir.), *cert. denied*, 368 U.S. 939 (1961). In *Basic Inc. v. Levinson*, ___ U.S. ___ (56 U.S.L.W. 4232, 4237, March 7, 1988), the Court stated that "[t]he modern securities markets, literally involving millions of shares changing hands daily, differ from the face-to-face transactions contemplated by early fraud cases . . . ."

In *SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 195 (1963), the Court indicated that common law doctrines of fraud that developed around transactions involving tangible items of wealth are ill-suited to the sale of intangibles such as securities. *See also* 3 L. Loss, *Securities Regulation* 1435 (2d ed. 1961). In *Blue Chip Stamps*, the Court decided the question of whether there should be an exception to the rule that only purchasers or sellers of securities may bring an action under Rule 10b-5. The Court traced the evolution of the common law tort of misrepresentation and deceit, "to which a claim under Rule 10b-5 certainly has some relationship," 421 U.S. at 744, *see Peil v. Speiser*, 806 F.2d 1154, 1160 (3d Cir. 1986), but explained the differences between that tort and relief under 10b-5. The Court noted that although one is required to be a purchaser or seller of securities in order to recover under section 10(b) or Rule 10b-5, "it has long been established in the ordinary case of deceit that a misrepresentation which leads to a refusal to purchase or to sell is actionable in just the same way as a misrepresentation which leads to the consummation of a purchase or sale." 421 U.S. at 744; *see Basic*, ___ U.S. at ___, 56 U.S.L.W. at 4237 n.22 (actions under Rule 10b-5 are distinct from common law deceit and misrepresentation claims). It is therefore clear that, far from being a mirror image or a reasonable facsimile of common law fraud, actions brought under section 10(b) and Rule 10b-5 appear to be *sui generis*.

Accordingly, because the Court has condemned a practice of dealing with section 10(b) and Rule 10b-5 that involves "a shifting and highly fact-oriented disposition of the issue," *Blue Chip Stamps*, 421 U.S. at 755, we believe that the Court is sending strong signals that we should adopt a uniform limitations period in these cases rather than try to color match each case with shifting state fraud statutes of repose.

Our very difficult task, however, is to decide whether a federal or a state statute of limitations should be borrowed. To do this, we must proceed on the assumption that Congress intends to borrow state law; we must borrow a state statute unless we find that state statutes of limitations are an unsatisfactory vehicle for the enforcement of this type of federal securities law. *Malley-Duff*, ___ U.S. at ___, 55 U.S.L.W. at 4953; *DelCostello*, 462 U.S. at 171-72. We now must determine whether a rule from elsewhere in federal law clearly provides a closer analogy than state statutes, and whether the federal policies at stake and the practicalities of litigation make the federal rule a significantly more appropriate vehicle.

VII.

We conclude that the federal schema of limitations expressly set forth in the Securities Exchange Act of 1934 "clearly provides a closer analogy than available state statutes," *DelCostello*, 462 U.S. at 172, and that "the federal policies at stake [in section 10(b) and Rule 10b-5 actions] and the practicalities of litigation make [the federal] rule a significantly more appropriate vehicle for interstitial lawmaking." *Id.* We now turn to those sections of federal securities law that are companion provisions to section 10(b).

Congress provided for statutes of repose in numerous provisions of the Securities Acts. The Securities Act of 1933 extended to the purchaser two years from the date of discovery of the fraud, but in no event more than 10 years after the sale. 48 Stat. 84 (1933). When Congress enacted the Securities Exchange Act of 1934, it amended the 1933 limitations statute (§ 13, 15 U.S.C. § 77m) and specified a new statute of limitations for each of the express rights of action it created. *See* § 9(e), 15 U.S.C. § 78i(e) (manipulation of security prices); § 16(b), 15 U.S.C.

§ 78p(b) (profits from purchase and sale of securities within six months); § 18(c), 15 U.S.C. § 78r(c) (liability for misleading statements in any application, report, or filed document). In 1938, Congress added a statute of limitations for section 29(b) of the 1934 Act, 15 U.S.C. § 78 cc(b) (validity of contract provisions in violation of Act or regulations thereunder).

Congress declared with specificity:

> No action shall be maintained to enforce any liability created under section 77k or 77l(2) of this title unless brought within one year after the discovery of the untrue statement or the omission, or after such discovery should have been made by the exercise of reasonable diligence, or, if the action is to enforce a liability created under section 77l(1) of this title, unless brought within one year after the violation upon which it is based. In no event shall any such action be brought to enforce a liability created under section 77k or 77l(1) of this title more than three years after the security was bona fide offered to the public, or under section 77l(2) of this title more than three years after the sale.

15 U.S.C. § 77m.

> No action shall be maintained to enforce any liability [for manipulating security prices] unless brought within one year after the discovery of the facts constituting the violation and within three years after such violation.

15 U.S.C. § 78i(e).

> No action shall be maintained to enforce any liability [for misleading statements in any application, report, or filed document] unless brought within one year after the discovery of the

> facts constituting the cause of action and within three years after such cause of action occurred.

15 U.S.C. § 78r(c).

> [No contract shall be deemed void] unless such action is brought within one year after the discovery that such sale or purchase involves such violation and within three years after such violation.

15 U.S.C. § 78cc(b). One exception from the absolute three-year bar is contained in the unlawful profit statute, section 16(b), 15 U.S.C. § 78p(b), which sets two rather than three years as the outside period of repose. We believe that Congress carved out an exception from the 1934 Act's time-year limitation period for section 16(b) because it desired to "prevent[] the unfair use of information . . . within any period of less than six months" and to require the disgorgement of profits realized from the sale or purchase of securites made within this limited time. Because the brief time period implicated in section 16(b) cases does not necessarily inhere in section 10b actions, we believe that the general one-year-after-discovery and three-years-after-the-violation schema is better suited for our consideration; we shall hereinafter refer to it as the time period that Congress provided in the 1934 Act.

There are reasons for the three-year period of repose in the 1934 Act. In *Norris v. Wirtz*, 818 F.2d 1329, 1332 (7th Cir.), *cert. denied*, 108 S. Ct. 329 (1987), the court noted:

> The legislative history in 1934 makes it pellucid that Congress included statutes of repose because of fear that lingering liabilities would disrupt normal business and facilitate false claims. It was

> understood that the three-year rule was to be absolute.

See Report of the Task Force on Statute of Limitations for Implied Actions. 41 Bus. Law. 645. 655 (1986); 6 J.S. Ellenberger & E. Mahar. *Legislative History of the Securities Act of 1933 and Securities Exchange Act of 1934* 6565-66. 6718. 6993 (1973). and 7 *id.* at 7743-44. Chief Judge Seitz was of the same mind:

> After the plaintiff has notice, there is a strong federal interest in requiring him to file suit quickly. First, an early action will alert other shareholders to possible misconduct in the affairs of the corporation. Second, the shorter period permits the company's management to treat a given securities transaction as closed, allowing them to proceed more confidently with running the company.

Roberts, 611 F.2d at 463 (Seitz, C.J., dissenting).

The source of our present problem is obvious. Congress did not expressly create a cause of action for the "manipulative or deceptive device or contrivance" that goes to the heart of section 10(b), 15 U.S.C. § 78j(b), and its nubile offspring, Rule 10b-5:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,
>
> (a) To employ any device, scheme, or artifice to defraud,
>
> (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of

the circumstances under which they were made, not misleading, or

(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

17 C.F.R. § 240.10b-5 (1987).

Congress cannot be faulted for not providing a statute of limitations, because the section 10(b) private cause of action was not enacted by it; it is a genie sired solely by the judiciary, and the genie having escaped from the bottle is not easily cabined. So the courts resort to the political science fiction of formulating judicially-declared "statutes" of limitations, suggesting that this would have been the intention of Congress had it created an express cause of action. It is a sort of hermaphroditic process: the courts invent the remedy and then seek to determine what would have been the intention of Congress as to a statute of limitations had it expressly created the private damage action. Because Congress takes no action to legislate to the contrary after an implied cause of action has been judicially formulated, we conclude that by *post hoc* inaction, Congress must have intended *ante hoc* that this is what it desired.

Statutes of limitations have been judicially-declared in a plethora of federal actions by borrowing various state and federal limitations periods. These limitations periods generally implement a remedy expressly provided by Congress. Rarely, however, do courts declare a statute of limitations for an implied cause of action that the judiciary, not Congress, has created.

Section 10(b) of the 1934 Act does not by its terms provide an express civil remedy for its violation. Nor does the history of this provision provide any

indication that Congress considered the problem of private suits under it at the time of its passage. *See, e.g.*, Note, *Implied Liability Under The Securities Exchange Act*, 61 Harv. L. Rev. 858, 861 (1948); A. Bromberg, *Securities Law: Fraud -- SEC Rule 10b-5* § 2.2 (300)-(340) (1968); S. Rep. No. 792, 73d Cong., 2d Sess. 5-6 (1934). Similarly, there is no indication that the Commission in adopting Rule 10b-5 considered the question of private civil remedies under this provision. SEC Securities Exchange Act Release No. 3230 (1942); Conference on Codification of the Federal Securities Laws, 22 Bus. Law. 793, 922 (1967); *Birnbaum v. Newport Steel Corp.*, 193 F.2d 461, 463 (2d Cir.), *cert. denied*, 343 U.S. 956 (1952); 3 L. Loss, *Securities Regulation* 1469 n.87 (2d ed. 1961). It was a district judge of this Circuit, Judge Kirkpatrick, who in 1946 first suggested that there was an implied cause of action under Rule 10b-5. *Kardon v. Nat'l Gypsum Co.*, 69 F. Supp. 512, 513-14 (E.D. Pa. 1946).

The Supreme Court did not deal with the subject until 25 years later. The Court confirmed with virtually no discussion the overwhelming consensus of the district courts and courts of appeals that such a cause of action did exist. *Superintendent of Ins. v. Bankers Life & Casualty Co.*, 404 U.S. 6, 13 n.9 (1971); *Affiliated Ute Citizens v. United States*, 406 U.S. 128, 150-54 (1972). Such a conclusion was entirely consistent with the Court's recognition in *J.I. Case Co. v. Borak*, 377 U.S. 426, 432 (1964), that private enforcement of Commission rules may provide "a necessary supplement to Commission action."

To decide what limitations period we should borrow, it therefore becomes imperative to look to the entire body of federal securities law of which section 10(b) and Rule 10b-5 are a part. The relevant law stems from two landmark statutes: the Securities Act of 1933 and the Securities Exchange Act of 1934. The 1933 Act

was described as an Act to "provide full and fair disclosure of the character of securities sold in interstate and foreign commerce and through the mails, and to prevent frauds in the sale thereof, and for other purposes." The Securities Exchange Act of 1934, 48 Stat. 881, as amended, 15 U.S.C. § 78a *et seq.*, was described as an Act "to provide for the regulation of securities exchanges and of over-the-counter markets operating in interstate and foreign commerce and through the mails, to prevent inequitable and unfair practices on such exchanges and markets, and for other purposes."

The various sections of the 1933 Act dealt at some length with the required contents of registration statements and prospectuses and expressly provided for private civil causes of action. Section 11(a) gave a right of action by reason of a false registration statement to "any person acquiring" the security, and section 12 of that Act gave a right to sue the seller of a security who had engaged in prescribed practices with respect to prospectuses and communication to "the person purchasing such security from him."

The 1934 Act was divided into two titles. Title I was denominated "Regulation of Securities Exchanges," and Title II was denominated "Amendments to Securities Act of 1933." Section 10 of that Act makes it "unlawful for any person . . . (b) [t]o use or employ in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the [Securities and Exchange] Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors." 15 U.S.C. § 78j(b). In 1942, acting under the authority granted to it by section 10(b) of the 1934 Act, the Commission promulgated Rule 10b-5, 17

C.F.R. § 240.10b-5, previously described by us in detail.

We find it necessary to recite this familiar history because it bears directly on the final controlling issue. We return to the test decreed by the Supreme Court: borrow a state statute of limitations period if you can, but "when the federal policies at stake and the practicalities of litigation make [a federal] rule a significantly more appropriate vehicle for interstitial lawmaking," *DelCostello v. International Bhd. of Teamsters*, 462 U.S. 151, 172 (1983), we should borrow the federal statute.

We think we find guidance, or at least a strong signal, from the discussion in the latest offering of the Supreme Court in June 1987. In *Malley-Duff*, the Court emphasized that for RICO actions "as with § 1983, a uniform statute of limitations is required to avoid intolerable 'uncertainty and time-consuming litigation.'" ___ U.S. at ___, 55 U.S.L.W. at 4954 (quoting *Wilson*, 471 U.S. at 272). But when it came to deciding whether to borrow a uniform limitations period from the body of state or federal law, the Court resorted to the process of analogy and found RICO much more comparable to the Clayton Act than to any state statute. If we apply the *Malley-Duff* test of "far closer analogy," we find that section 10(b) of the Securities Exchange Act of 1934 bears "a far closer analogy to [companion provisions in the 1934 Act] than any state alternative." *Id.*

Both section 10(b) and its companion provisions -- § 9(e) (manipulation of security prices); § 16(b) (profits from purchase and sale of securities within six months); § 18(c) (liability for misleading statements in any application, report, or filed document); and § 29(b) (validity of contract provisions in violation of Act or regulations thereunder) -- are aimed at the same objectives. All of these companion provisions, except

section 16(b), have a uniform federal limitations period. All reflect, in common with section 10(b), the purpose of the original Securities Act of 1933:

> to "provide full and fair disclosure of the character of securities sold in interstate and foreign commerce and through the mails, and to prevent frauds in the sale thereof, and for other purposes."

Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 728 (1975) (quoting 1933 Act); *see Basic Inc. v. Levinson*, ___ U.S. ___ (56 U.S.L.W. 4232, 4233, March 7, 1988). All aim to compensate the same type of injury. All are designed to fill a void in the common law and to create remedies that would be uniform throughout our nation's commercial universe, instead of being subjected to the vagaries of independent and diverse state statutory regulations.

Authorized by the interstate commerce clause and responding to the need for national uniformity (an absolute component of our national economy), the remedies under the Securities Acts are made uniform by federal law in all 50 states. What Justice Story stated with great eloquence, in another era in another context, seems especially appropriate here:

> the law respecting [securities] may be truly declared in the language of Cicero, adopted by Lord Mansfield in *Luke v. Lyde*, 2 Burr. 883, 887, to be in a great measure, not the law of a single country only, but of the commercial world. *Non erit alia lex Romae, alia Athenis; alia nunc, alia posthac; sed et apud omnes gentes, et omni tempore una eademque lex obtinebit.*

Swift v. Tyson, 16 Pet. 1, 10 L. Ed. 865, 871 (U.S. 1842).

The necessity for uniform federal remedies in security cases would seem to demand recourse to a

uniform federal statute of limitations. A broker in New York, an issuer in Delaware, a purchaser in San Francisco, an accountant in New Jersey, and a lawyer in Pennsylvania should be subject to the same statute of limitations for actions based on section 10(b) or Rule 10b-5. Again with a nod to Cicero, you simply should not have a different Securities Act limitations period for Rome, New York, and Athens, Georgia (*Non erit alia lex Romae, alia Athenis*). And since uniformity is not to be found in the diverse body of state tort limitations, we are impelled inexorably to look to federal limitations for borrowing purposes.

Moreover, the same problem inheres in the plethora of state blue sky laws, which have widely varying statutes of limitations as well as disparate statutory coverage. For example, Delaware limits actions to "2 years after the contract of sale." Del. Code Ann. tit. 6, § 7323(e). New Jersey allows actions no more than "two years after the contract of sale, or within two years of the time when the person aggrieved knew or should have known of the existence of his cause of action, whichever is later." N.J.S.A. § 49:3-71(e). Pennsylvania allows suit within four years after the alleged violation, or within one year after the plaintiff discovers or should have known the facts constituting the violation, "whichever shall first expire." 70 Pa. Cons. Stat. § 1-504(a). *See also Suslick v. Rothschild Securities Corp.*, 741 F.2d 1000 (7th Cir. 1984) (applying Illinois' three-year blue sky statute); *Buder v. Merrill, Lynch, Pierce, Fenner & Smith, Inc.*, 644 F.2d 690 (8th Cir. 1981) (applying Missouri's two-year blue sky period); *O'Hara v. Kovens*, 625 F.2d 15 (4th Cir. 1980) (applying Maryland's one-year blue sky statute), *cert. denied*, 449 U.S. 1124 (1981).

It is difficult to consider a limitations statute that better reflects the "federal policies at stake" and the "practicalities of litigation" in a case based on the

Securities Exchange Act of 1934 than those provisions of the Act that explicitly and expressly state such a period. Fidelity to the strong federal policies announced in *Norris v. Wirtz*, 818 F.2d 1329, 1332 (7th Cir.), *cert. denied*, 108 S. Ct. 329 (1987), and *Roberts*, 611 F.2d at 463 (Seitz, C.J., dissenting), would strongly counsel that we adopt the 1934 Act limitations period. Indeed, because the Supreme Court opened the door to borrowing relevant federal limitations statutes, and in light of the congressional philosophy and purposes set forth in the 1933 and 1934 Acts that have been so consistently emphasized and implemented by the federal courts, it would seem bizarre if not anomalous to go beyond the express statutes of limitations contained in provisions of the 1934 Act.

VIII.

We now recount the route we have travelled. We have concluded that because of *DelCostello*, *Wilson*, and *Malley-Duff*, and because we are a court in banc, we are free to re-examine the reasoning and holdings of *Roberts* and *Biggans*. We recognize that the Supreme Court has rejected the claim-by-claim analysis that underlies our previous decisions:

> Although it has been suggested that federal courts always should apply the state statute of limitations most analogous to each individual case whenever a federal statute is silent on the proper limitations period . . . a clear majority of the Court rejected such a single path.

Agency Holding Corp v. Malley-Duff & Assocs., Inc., ___ U.S. ___, ___ (55 U.S.L.W. 4952, 4953, June 22, 1987). At least in the context of RICO, our court favors "the *one* most appropriate statute of limitations for *all* civil . . . claims," *Malley-Duff & Assocs., Inc. v. Crown*

Life Ins. Co., 792 F.2d 341, 349 (3d Cir. 1986), *aff'd sub nom. Agency Holding Corp. v. Malley-Duff & Assocs., Inc., supra*, and we have rejected an "ad hoc approach" because it "would create 'uncertainty and time-consuming litigation.'" *A.J. Cunningham Packing Corp. v. Congress Fin. Corp.*, 792 F.2d 330, 337 (3d Cir. 1986) (Sloviter, J., concurring) (quoting *Wilson*, 471 U.S. at 272). We have also shown that section 10(b) actions cover the national scene in terms of multiple variations of conduct -- the broker in the Northeast, the issuer in the Mid-Atlantic, the purchaser on the West Coast, the accountant and the lawyer elsewhere -- and we think that, as in section 1983 and RICO cases, "any analogies to traditional state causes of action 'are bound to be imperfect.'" *Crown Life*, 792 F.2d at 348 (quoting *Wilson*, 471 U.S. at 272).

Finally, notwithstanding the 1979 concerns of Judge Gibbons and Chief Judge Seitz in *Roberts* that we could not "borrow" federal statutes because "an inferior federal court is not free to change" the practice, 611 F.2d at 454, and that the Supreme Court "has rarely deviated from the normal rule of looking to state [rather than federal] statutes," *id.* at 463, the Supreme Court in *DelCostello* and *Malley-Duff* has changed all that. We believe that this is just that kind of case where "a rule from elsewhere in federal law provides a closer analogy than available state statutes," *DelCostello*, 462 U.S. at 172, and that the rule of repose found in companion sections of the 1934 Act furnishes the best analogy. *See Malley-Duff*, ___ U.S. at ___, 55 U.S.L.W. at 4953.

We have decided therefore that the express limitations sections of the Securities Exchange Act of 1934 provide the preferable source of limitations borrowing here. As Professor Loss puts it:

> This reference to state law makes for a great amount of utterly wasteful litigation. . . . Would it not be eminently more consistent with the overall statutory scheme to look to what Congress itself did when it was thinking specifically of private actions in securities cases rather than to a grab-bag of more or less analogous state statutes?

L. Loss, *Fundamentals of Securities Regulation* 1168-69 (1983). When Congress has created a right to sue in securities matters, it has, with one exception, declared a limitations period no longer than three years. *See* 15 U.S.C. § 77m; 15 U.S.C. § 78i(e); 15 U.S.C. § 78r(c); 15 U.S.C. § 78cc(b).

Accordingly, we have decided that the proper period of limitations for a complaint charging violation of section 10(b) and Rule 10b-5 is one year after the plaintiff discovers the facts constituting the violation, and in no event more than three years after such violation.

IX.

The foregoing analysis supplies the answers to the questions certified for decision. Under 28 U.S.C. § 1292(b), "our jurisdiction extends only to orders of the district court." *Link v. Mercedes Benz of N. Am., Inc.*, 550 F.2d 860, 863 (3d Cir.) (in banc), *cert. denied*, 431 U.S. 933 (1977). In certifying the questions for our consideration, the district court did not request that we address the issue of whether our rulings should have prospective effect only and not apply to the present case. "We have refused to reach an issue posed by an order appealed under section 1292(b) where that issue was not addressed by the district court . . . or where the issue involved factual determinations better left to the district court." *Miller*

v. Bolger, 802 F.2d 660, 666-67 (3d Cir. 1986) (citations omitted). Accordingly, we do not meet the prospectivity issue here.

For reasons other than those stated by the district court, we have declined to borrow the two-year statute of limitations from New Jersey's blue sky law. Moreover, we have decided that the district court's decision to borrow the six-year limitations period for fraud will be reversed. The cause will be remanded with a direction that the court proceed in accordance with this opinion.

SEITZ, *Circuit Judge*, with whom Judges SLOVITER and MANSMANN join, dissenting.

Accepting the correctness of the new rule of law adopted today that a federal statute of limitations controls here, I dissent because I believe the majority commits egregious error in not addressing and resolving plaintiffs' argument that if a new limitations rule is adopted, it should not be applied to this case.

Initially, there is a special irony in the majority's implied criticism of the dissent for reaching the retroactivity issue when it was not a certified question. The majority itself, in establishing a federal statute of limitations rule, is not answering the formal language of any certified question. The parties have not even documented any basis that would justify the conclusion that a federal limitations rule was proposed to the district court.

Another curious feature of the majority opinion is that it rules on a "decision" of the district court rather than on the order being appealed, even while recognizing that it is the order that forms the

jurisdictional basis for our power of review. *Miller v. Bolger*, 802 F.2d 660, 666 (3d Cir. 1986)("our review is of orders and not of isolated legal questions"). As we indicated in *Johnson v. Alldredge*, 488 F.2d 820 (3d Cir. 1973), *cert. denied*, 419 U.S. 882 (1974), section 1292(b) specifically involves an appeal from an order and we must act on the order. As this court said in *Link v. Mercedes-Benz*, 550 F.2d 860, 863 (3d Cir.), *cert. denied*, 431 U.S. 933 (1977), "orders must be in a posture capable of affirmance or reversal" to be appealable under section 1292(b).

Once it is realized that we are obligated to rule on the district court's order denying the motion to dismiss the third amended complaint on statute of limitations grounds, it necessarily follows that we must determine its correctness. This is so even though our court has now adopted a new rule of law in reviewing the order. As Judge Gibbons stated:

> An appeal pursuant to § 1292(b), like any other, is taken from the order of the district court, not from its opinion, and the court is "called upon not to answer the question certified but to decide an appeal." *Johnson v. Alldredge, supra*, 488 F.2d at 823. When an order or judgment is before a reviewing court, "[t]he prevailing party may . . . assert in the reviewing court any ground in support of his judgment, whether or not that ground was relied upon or even considered by the trial court." *Dandridge v. Williams*, 397 U.S. 471, 475 n.6 . . . (1970); *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 381 n.4 . . . (1970); *see* Note, *Federal Jurisdiction and Procedure -- Review of Errors at the Instance of a Non-Appealing Party*, 51 Harv. L. Rev. 1058, 1059-60 (1938).

Consolidated Express, Inc. v. New York Shipping Ass'n, 602 F.2d 494, 502 (3d Cir. 1979), *vacated and remanded for further consideration*, 448 U.S. 902 (1980).[1]

Thus, in passing on the correctness of the district court's order we must consider any ground now asserted in support of the order "whether or not that ground was relied upon or even considered by the trial court." *Id.* (quoting *Dandridge v. Williams*, 397 U.S. 471, 475 n.6 (1970)).[2] Whether to reverse or affirm the district court's order therefore requires a decision whether the controlling rule of law will be applied here. Moreover, not to determine now whether the new rule adopted by the majority is to be applicable to the order in this case is to make a mockery of the very objective of section 1292(b) "that an immediate appeal from the order may materially advance the ultimate termination of the litigation, . . ." Indeed, it is commonplace for courts formulating a new or different rule of law to rule on its retroactivity at the same time. *See, e.g., Northern Pipeline Const. Co. v. Marathon Pipe Line*

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1. The district court's obligation to identify a "controlling question of law as to which there is substantial ground for difference of opinion," pursuant to 28 U.S.C. § 1292(b), *see also* Third Circuit Rule 23, is to be contrasted with state laws which permit "certification" by federal courts to the state's supreme court of questions under state law. *See generally* 1A J. Moore, W. Taggart, A. Vestal & J. Wicker, *Moore's Federal Practice* ¶ 0.203[5] (1985).

2. The quotation in the majority opinion from *Miller v. Bolger*, 802 F.2d 660 (3d Cir. 1986) is inapposite here. In view of the district court's ruling, it had no reason to address retroactivity. Unlike *Miller*, in which this court declined to rule on an issue that required "determinations that should be left to the district court in the first instance," the majority does not identify any issue of material fact here with respect to the retroactivity issue, and I am convinced that there is no such issue. Accordingly, I see no reason to forgo our obligation to resolve the retroactivity question.

Co., 458 U.S. 50 (1982); *cf. Mineo v. Port Authority*, 779 F.2d 939 (3d Cir. 1985)(holding that *Garcia v. San Antonio Metropolitan Transit Auth.*, 469 U.S. 528 (1985) should not be applied retroactively), *cert. denied*, 106 S. Ct. 3297 (1986).

I am therefore convinced that the retroactivity issue must be addressed in determining whether the new rule of law should be applied to the district court's order in this case.

I commence my analysis from the established legal principle that this court has the power to apply a rule of law prospectively only. *See Northern Pipeline*, 458 U.S. 50; *Cohn v. G.D. Searle & Co.*, 784 F.2d 460 (3d Cir.), *cert. denied*, 107 S. Ct. 272 (1986). The Supreme Court has set forth a three-part test for determining when a court should not apply a newly announced rule of law retroactively. *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971). The *Chevron* Court stated:

> First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, see, *e.g.*, *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, [392 U.S. 481, 496 (1968)], or by deciding an issue of first impression whose resolution was not clearly foreshadowed, see, *e.g.*, *Allen v. State Board of Elections*, [393 U.S. 544, 572 (1969)]. Second, it has been stressed that "we must . . . weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." *Linkletter v. Walker*, [381 U.S. 618, 629 (1965)]. Finally, we have weighed the inequity imposed by retroactive application, for "[w]here a decision of this Court could produce substantial

> inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity." *Cipriano v. City of Houma*, [395 U.S. 701, 706 (1969)].

Chevron, 404 U.S. at 106-07; *see Cohn*, 784 F.2d 460.

Although the *Chevron* Court was determining whether the holding of a previous case should have been applied retroactively, there is no doubt that the *Chevron* principles are equally applicable where a new principle of law is announced in the case *sub judice*. *See, e.g., Northern Pipeline*, 458 U.S. 50 (applying *Chevron* retroactivity test in case announcing new principle of law); *Cohn*, 784 F.2d 460; *Ettinger v. Central Penn Nat'l Bank*, 634 F.2d 120 (3d Cir. 1980).

The first question to be answered here under *Chevron* is whether the rule of law announced by the majority is a clear break with past precedent on which litigants may have relied. *See Saint Francis College v. Al-Khazraji*, 107 S. Ct. 2022, 2025-26 (1987) (approving Third Circuit's nonretroactive application of its holding overruling "clearly established circuit precedent on which the complaining party was entitled to rely"). This question is answered by examining the precedent in this circuit at the time the third amended complaint was filed against the appealing defendants.[3] At that time, the law of the circuit was: 1) that a court was to determine the appropriate statute of limitations in securities fraud cases by looking to the *state* statute of limitations that best comported with the federal policies underlying Rule 10b-5, and that process began by applying the state's blue sky law, which was regarded as the most logical state law candidate; and 2)

3. I do not intend to imply that the date the complaint is filed would necessarily be the critical date in all cases applying the *Chevron* principles.

that if, however, there was no civil damage remedy under the blue sky law for the claim in question, a court was to apply the state statute of limitations for fraud. *See Biggans v. Bache Halsey Stuart Shields, Inc.*, 638 F.2d 605 (3d Cir. 1980); *Roberts v. Magnetic Metals Co.*, 611 F.2d 450 (3d Cir. 1979) (applying New Jersey law). In light of the precedent in this court applying state statutes of limitations to federal securities claims, *see Biggans*, 638 F.2d 605; *Roberts*, 611 F.2d 450, and in view of the fact that none of the Supreme Court cases cited by the majority[4] even considered, much less clearly overruled, Third Circuit precedent dealing with securities fraud, today's action of our court in overruling those cases and adopting a federal statute of limitations clearly overturns past circuit precedent on which these plaintiffs may have relied.

The second *Chevron* question is whether applying the federal statute of limitations to this action would further or retard its operation. Applying this portion of the test, the *Chevron* Court noted that retroactive application of the statute of limitations rule under consideration in that case would have deprived the plaintiff of "any remedy whatsoever on the basis of superseding legal doctrine that was quite unforeseeable." *Chevron*, 404 U.S. at 108. That reasoning is equally applicable here. Additionally, applying the new rule prospectively only would not significantly further or retard the policies underlying its general applicability.

The third part of the *Chevron* test requires an examination of the equities of the instant case to

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4. *Agency Holding Corp. v. Malley-Duff & Assocs., Inc.*, 107 S. Ct. 2759 (1987) (decided after appealing defendants were joined in the instant action); *Wilson v. Garcia*, 471 U.S. 261 (1985); *DelCostello v. International Bhd. of Teamsters*, 462 U.S. 151 (1983).

determine whether the federal statute of limitations should be applied to this action. As the *Chevron* Court noted, "[i]t would . . . produce the most 'substantial inequitable results' . . . to hold that [plaintiff] 'slept on his rights' at a time when he could not have known the time limitation that the law imposed upon him. . . . [N]onretroactive application here simply preserves his right to a day in court." *Chevron*, 404 U.S. at 108; *see also Cohn*, 784 F.2d at 465. The same is true here. The district court's order borrowing the six-year period of limitations will preserve the plaintiffs' opportunity to have a day in court; application of the majority's newly announced rule will foreclose that opportunity.

The foregoing analysis, in my view, mandates that the rule announced today not be applied to this case. Under these circumstances, it is necessary to ascertain the applicable New Jersey statute of limitations. The inquiry under prior precedent is whether the operative allegations of plaintiffs' complaint stated a cognizable claim under the blue sky law. The New Jersey blue sky law provides in pertinent part:

> (a) *Any person who*
>
> (1) *Offers or sells* a security in violation of sections 8(b), 9(a) or 13 of this act, or
>
> (2) *Offers or sells* a security by means of [specified conduct] *is liable to the person buying the security from him* . . . ;
>
> (b) Every person who directly or indirectly controls a seller liable under paragraph (a), every partner, officer, or director of such a seller, every person occupying a similar status or performing similar functions, every employee of such a seller who materially aids in the sale, and every broker-dealer or agent who materially aids in the sale are also liable jointly and severally with and

> to the same extent as the seller. unless the nonseller who is so liable sustains the burden of proof that he did not know. and in the exercise of reasonable care could not have known. of the existence of the facts by reason of which the liability is alleged to exist. . . .
>
> . . . .
>
> (h) The rights and remedies provided by this act are in addition to any other rights or remedies that may exist at law or in equity. but this law does not create any cause of action not specified in this section or section 10. paragraph (e).

N.J. Stat. Ann. § 49:3-71 (West 1970) (emphasis added).

The third amended complaint alleged that the appealing defendants. an accountant and his firm and an attorney and his firm. had violated section 10(b) and rule 10b-5 by actively participating in. and aiding and abetting. a conspiracy to defraud plaintiffs. Essentially for the reasons cited by the district court. i.e.. the appealing defendants did not sell securities to the plaintiffs and the defendants were outside the scope of liability imposed by the plain language of the blue sky law. I conclude that plaintiffs' complaint did not state a claim under the blue sky law. I believe the New Jersey Supreme Court would construe the statute similarly. It follows. then. that the district court properly applied the New Jersey six-year statute of limitations for fraud. Accordingly. I would affirm the order of the district court denying the defendants' motion to dismiss.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

IN RE: DATA ACCESS SYSTEMS SECURITIES LITIGATION THIS DOCUMENT RELATES TO: ALL CASES	MASTER FILE NO. 81-1923 OPINION

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BROTMAN, *District Judge*

Plaintiffs filed their Third Consolidated Amended Class Action complaint in this action on January 7, 1986 to add additional defendants. Certain of those additional defendants now move to dismiss the complaint on various grounds. Those defendants include Roger Tolins, Esquire, a New York attorney, and Tolins & Lowenfels ("T & L"), his law firm. Tolins and T&L represented Data Access Systems, Inc. ("DASI") in fiscal years 1978, 1979 and 1980 in connection with routine SEC filings and a public

offering. Defendants Peter Cunicelli and I. Kahlowsky & Co. provided accounting services to Mark Serv and, according to the complaint, misrepresented the nature of certain Mark-Serv transactions with DASI to Touche Ross in connection with Touche's opinions as to DASI's financial statements.

The DASI case has been with this court for several years, and the court is intimately familiar with every aspect of the underlying facts and procedural history. The court assumes that counsel are equally familiar with the overall panorama and for purposes of this motion will refer only to the specific allegations against the moving defendants.

The Allegations of the Third Consolidated Amended Class Action Complaint

1. *Tolins and T&L*

Plaintiffs contend that Tolins and T&L knew or reasonably should have known that the representations contained in the DASI prospectus and Form 10-Ks, as well as those contained in the Transnet Form 10-Ks, were materially inaccurate in that, *inter alia*, they represented that DASI had no ongoing liabilities in connection with the cluster transactions between DASI and its cluster purchasers (i.e., Mark Serv, Transnet, and Olympic International Leasing Co.). The complaint alleges that Tolins ignored or disregarded clear evidence that such representations were in fact false, including, *inter alia*, the fact that the cluster purchasers had

assigned their rights under printed lease agreements (which were to be with recourse to DASI) to their lending banks as collateral for the bank loans which financed the cluster transactions. Complaint ¶28. The complaint also alleges that T&L actively participated in the fraud of, aided and abetted, and conspired with the DASI principals and others identified in the complaint to defraud plaintiffs and the class *Id.* at ¶40. Tolins and T&L are charged with violation of Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 (Count IV), common law fraud (Count V) and common law negligence (Count VI).

2. *Kahlowsky and Cunicelli*

The complaint alleges that during certain periods, Kahlowsky and Cunicelli performed auditing and/or other accounting services for Mark Serv, EO Data Corp., Samay Industries, Inc., Gerald Cicconi, Peter DiGiulio, and other related persons and entities. *Id.* ¶3. The complaint also alleges that during Touche Ross' audits of DASI's financial statements in 1978, 1979 and 1980, Touche Ross sought information from Kahlowsky on, *inter alia*, Mark Serv's business dealings with DASI, including whether DASI had any contingent liabilities to Mark Serv or to Mark Serv's lending banks. *Id.* ¶10. In response to those inquiries, Kahlowsky and Cunicelli allegedly advised Touche Ross that DASI had incurred no such liabilities and that the lenders were not relying on DASI in any way as security for loans to Mark Serv. *Id.* ¶11. The complaint further alleges

that when Kahlowsky and Cunicelli made these representations, they knew that the lenders in fact held Mark Serv/DASI leases for their loans to Mark Serv. *Id.* ¶¶12-14.

The complaint alleges that Kahlowsky and Cunicelli knew these circumstances, and intended that such misrepresentations be publicly disseminated in DASI's financial statements, as audited by Touche Ross. Plaintiffs contend that Kahlowsky and Cunicelli actively participated in the fraud of, aided and abetted, and conspired with DASI principals and others to defraud plaintiffs and the class in violation of Section 10(b) and Rule 10b-5 (Count I). The complaint also charges Kahlowsky and Cunicelli with common law fraud (Count II) and common law negligence (Count III).

The §10(b) and Rule 10b-5 Claims

Defendants contend that plaintiffs' claims under §10(b) of the 1934 Act and Rule 10b-5 are time-barred. There is no uniform statute of limitations for implied private actions under §10(b). Federal courts must therefore refer to the forum state's most closely analogous cause of action and its accompanying statute of limitations. *Holmberg v. Armbrecht*, 327 U.S. 392, 395 (1946).

Plaintiffs urge this court to apply New Jersey's six-year statute of limitations for common law fraud, arguing that no other state cause of action provides a comparable remedy. Defendants, on the other hand, insist that the two-year statute of

limitations of the New Jersey Uniform Securities Act, N.J.S.A. 49:3-71, applies. That act is commonly known as New Jersey's blue sky law.

Unlike some other circuits, which have adopted a bright-line approach to this problem, the Third Circuit prefers a case-by-case analysis to determine which state law statute of limitations is most appropriate. *See Sharp v. Cooper & Lybrand*, 649 F.2d 175 (3rd Cir. 1981); *Biggans v. Bache Halsey Stuart Shields, Inc.*, 638 F.2d 605 (3rd Cir. 1980); and *Roberts v. Magnetic Metals Co.*, 611 F.2d 450 (3rd Cir. 1979).

The *Roberts* court produced three opinions. Judge Gibbons, writing for the court, held that because New Jersey blue sky law did not furnish a seller of securities with a remedy against a fraudulent buyer, the six-year general statute of limitations applied. Judge Gibbons' analysis focused on the policy of repose of the forum state and suggested that a federal court should first consider whether, based on the operative facts, a state court would entertain an action for the relief sought and then apply the corresponding statute of limitations. 611 F.2d at 452.

Judge Sloviter wrote an opinion which concurred in Judge Gibbons' result but gave relief on a different analysis. She reasoned that the court's primary concern should be the substantive policy embodied in the federal securities laws. A state's policy of repose would, under Judge Sloviter's approach, become relevent only to the extent it was consistent

with the federal claim. Ordinarily, Judge Sloviter's analysis would lead to the application of the limitations period of the forum state's analogous securities law. However, in *Roberts* Judge Sloviter agreed that because New Jersey's law made no provision for a seller's remedy, the general limitations period for fraud was most appropriate.

Dissenting, Judge Seitz argued that in a §10(b) case the federal court should always look to the state statute which addresses the same regulatory area, whether or not there exists a precise analogy between the state and federal causes of action. His approach looks first to which state substantive remedy is most analogous to the federal statute and sceond to whether the applicable statute of limitations best effectuates federal policy. Judge Weis suggested that "the function of analogy in this context . . . is to find proximity, not congruity." 611 F.2d at 462.

The Third Circuit considered the same issue the following year in *Biggans v. Bache Halsey Stuart Shields*, 638 F.2d 605 (3rd Cir. 1980). Plaintiffs, sellers of securities, sued for damages under §10(b), alleging that the defendant, a broker-dealer, had engaged in churning. The court had to decide whether to apply the Pennsylvania blue sky law statute of limitations or the limitations period for common law fraud. Although the blue sky law specifically prohibited churning, it provided only for injunctive relief, not damages. Judge Sloviter,

joined by Judge Gibbons, wrote the majority opinion and held that the statute of limitations for fraud should apply because the remedy plaintiffs sought was not available under the state blue sky law. Judge Weis dissented and endorsed Judge Seitz's approach in his *Roberts* dissent.

District courts applying the holdings of *Biggans* and *Roberts* in recent years have consistently held that where the state blue sky law provides plaintiffs with an appropriate remedy, the court should apply the corresponding statutes of limitations. *Bartichek v. Continental Energy Group, Ltd.* Civ. No. 83-5019, slip op. (D.N.J. July 9, 1984) (Debevoise, J.); *Corson v. First Jersey Securities, Inc.* 537 F. Supp. 1263 (D.N.J. 1982) (Gerry, J.); *Goodman v. Moyer*, 523 F. Supp. 35 (E.D. Pa. 1981); *Hill v. Der*, 521 F. Supp. 1370 (D. Del. 1981).

The central question, therefore, is whether the plaintiffs would have a viable cause of action against defendants Tolins, T&L, Kahlowsky and Cunicelli under New Jersey's blue sky law. If they would, then the court must apply the shorter limitation period. None of the moving defendants sold securities to plaintiffs. As DASI's attorneys and as auditors who advised Touche Ross on DASI's transactions with Mark Serv, they fall outside the scope of liability created by the statute.[1] Other district

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[1] Defendants Tolins and T&L rely on *Bartichek, supra*, for the proposition that attorneys involved in preparing offering documents can be sellers under the blue sky law. However, Judge Debevoise's holding on the statute of limitations/blue sky issue did not concern the attorney defendants, who had moved for dismissal of the federal

courts have held that essentially identical state blue sky laws do not create liability for non-sellers. *E.g.*, *Hill v. Equity Trust Co.*, 562 F. Supp. 1324, 1338 (D. Del. 1983). Under the facts as alleged in the complaint, the moving defendants cannot plausibly be characterized as sellers, controlling persons, or employees, agents or broker dealers who "materially aided" in the sale. N.J.S.A. 49:3-71(a). Accordingly, this court believes that no cause of action would lie against these defendants under the New Jersey blue sky law and that the statute of limitations period for common law fraud is most appropriate.

Defendants rely on a single New Jersey case for the proposition that any person with even "minimal participation" in a fraudulent sale is potentially liable. *Cola v. Terzano*, 129 N.J. Super. 47, 54 (Law Div. 1974), *aff'd*, 156 N.J. Super. 77 (App. Div. 1978). The *Cola* case however, specifically referred to the "narrow exception" clause of New Jersey's blue sky law, N.J.S.A. 49:3-71(b) and in speaking of other jurisdictions which extend liability to officers, directors, "control persons" and similarly situated non-sellers. *Id.* at 54. *Cola* itself addressed the liability of a seller, so its language about non-sellers is purely dictum and not binding.

Defendants point to language in the complaint alleging that they had "substantial participation" in

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securities count solely on the theory of failure to plead fraud with particularity.

the alleged fraud and that they "aided and abetted" other defendants to support their argument that a cause of action would lie under the blue sky law by analogy to §12(2) of the Securities Act of 1933.

New Jersey's blue sky law, like those of most other states, is modeled on §12(2) of the Securities Act of 1933, 15 U.S.C. §77l(2). As the drafters of the Uniform Securities Act noted, "[t]he resemblance to §12(2) of the Securities Act . . . will once more make for an interchangeability of federal and state judicial precedence [sic] in this very important area." Loss, *Commentary on the Uniform Securities Act* (1976) at 147. Defendants claim that under a "long line" of such interchangeable federal precedents, it is "well-settled" that non-sellers, including attorneys, are liable as sellers under the blue sky model if they "substantially participate" in the sale of securities. Defendants' Reply Brief at 6.

Defendants' logic is sound but unpersuasive. Certain courts have extended liability under §12(2) to non-sellers whose participation in the sale is "substantial." *E.g.*, *Junker v. Crory*, 650 F.2d 1349, 1358-60 (5th Cir. 1981). Most notably, the Second, Fifth and Ninth Circuit Courts of Appeals have adopted this approach. *See, e.g.*, *Admiralty Fund v. Jones*, 677 F.2d 1289, 1294-95 (9th Cir. 1982); *Junker v. Crory*, *supra*; *Pharo v. Smith*, 621 F.2d 656, 667 (5th Cir. 1980); *Katz v. Amos Trust & Co.*, 411 F.2d 1046, 1053 (2nd Cir. 1969); *Klein v. Computer Devices, Inc.*, 602 F. Supp. 837 (S.D.N.Y.

1985); *In re Diasonics Securities Litigation*, 599 F. Supp. 447 (N.D. Cal. 1984).

The Third Circuit, however, has not enunciated a "substantial participation" standard for interpreting §12(2). On the contrary, it has refused to extend the meaning of §12(2) beyond its plain language. In *Collins v. Signetics Corp.*, 605 F.2d 110 (3rd Cir. 1979), the court refused to extend §12(2) liability to an issuer of securities.

> We have no difficulty in concluding that Congress intended the unambiguous language of §12(2) to mean exactly what it says: "Any person who-. . . (2) offers or sells a security . . . shall be liable to the person purchasing from him. . . ." This section is designed as a vehicle for a purchaser to claim against his immediate seller. Any broader interpretation would not only torture the plain meaning of the statutory language but would also frustrate the statutory scheme because Congress has also provided a specific remedy for a purchaser to utilize against the issuer as distinguished from the seller of a security.

605 F.2d at 113. Significantly, the *Collins* court observed that "[i]n interpreting liability provisions of the [securities] acts, we must respect recent Supreme Court teachings that militate against excessively expansive readings." *Id.* As another district court in this circuit has noted, *Collins* strongly suggests that the Third Circuit would not follow the

expansive approach of the "substantial participation" theory. *In re Catanella and E.F. Hutton and Co.*, 583 F. Supp. 1388, 1418 n. 46 (E.D. Pa. 1984). Other circuits continue to require privity between a plaintiff and a §12(2) seller. *See, e.g., Wagman v. FSC Securities Corp.*, Fed. Sec. L. Rep. ¶92,445 (N.D. Ill. July 23, 1985) (Seventh Circuit). And even the Ninth Circuit has expressed certain reservations about the viability of the substantial participation theory "in light of recent Supreme Court cases that prescribe a strict statutory construction approach to the securities acts and reject their expansion with tort and criminal theories." *Admiralty Fund v. Jones, supra*, 677 F.2d at 1294 n.3, *citing Admiralty Fund v. Hugh Johnson & Co.*, 677 F.2d 1301, 1311 n.12 (9th Cir. 1982).

Just as the Third Circuit would likely refuse to extend liability to attorneys or accountants under §12(2) of the Securities Act, so too will this court limit the reach of New Jersey's blue sky law to its plain language. The statute imposes liability on sellers. N.J.S.A. 49:3-71(a)(2). The New Jersey legislature saw fit to expand that liability to a designated class of persons with certain relationships to the seller. Those exceptions include: controlling persons, partners, officers or directors; employees or broker-dealers or agents who materially aid in the sale. Had the legislature wanted to extend liability to sellers' attorneys or accountants, the court is confident it would have done so. Consequently, it appears that plaintiffs would have no

cause of action against defendants Tolins, T&L, Kahlowsky or Cunicelli under New Jersey's blue sky law. The court will apply the six-year statute of limitations for common law fraud.

When the Claims Arose

To determine whether the complaint was timely filed, the court must next decide when plaintiffs' federal claims arose against these defendants. Tolins & T&L concede in their papers and at oral argument that plaintiffs had sufficient knowledge to start the limitations statute running in June 1981, when Touche Ross made its public announcement.

Federal law determines when a cause of action arising under §10(b) accrues and when the limitations period begins to run on the claim. *Hill v. Equitable Bank, N.A., supra*, 599 F. Supp. at 1972. "A [rule] 10b-5 cause of action accrues on the date that the purchase or sale of securities in question occurred. *Id.* at 1072.

This court held in 1984 that the certified class period ended June 22, 1981. *In re Data Access Systems Securities Litigation*, 103 F.R.D. 130, 150 (D.N.J. 1984). Plaintiffs' purchases of DASI stock in the case at bar were effected through that date. Accordingly, plaintiffs' claims can be determined to have accrued at that time.

Plaintiffs make several arguments that their cause of action could have arisen at later dates, but the court will not address those arguments since it

is applying the six-year statute of limitations rather than the two-year limit urged by defendants. Similarly, the court will not prolong its discussion of defendants' argument that the cause of action may have accrued prior to June 1981. As noted, the Tolins defendants essentially concede that June 1981 is the earliest date. As for Kahlowsky and Cunicelli, even if it is true that their activity in this case ceased in February 1979, as defendants assert, their alleged fraud was certainly "in connection with" plaintiffs' purchases of DASI securities. *See generally Angelastro v. Prudential-Bache Securities, Inc.*, 764 F.2d 939, 942-44 (3rd Cir. 1985).

Therefore, since plaintiffs' claims could have arisen as early as June 1981, the complaint was filed well within the six-year limitations period. Accordingly, the court need not reach the issues of equitable tolling or relation back of amendments under Fed. R. Civ. P. 15(c).

Whether Fraud was Pleaded with Sufficient Particularity

Defendants Kahlowsky and Cunicelli also argue that plaintiffs' §10(b) claims should fall because they fail to state the alleged fraud with the particularity required by Fed. R. Civ. P. 9(b).

That rule provides: "In all averments of fraud or mistake, the circumstances constituting fraud shall be stated with particularity." The Third Circuit has noted, however, that "focusing exclusively on [Rule 9(b)'s] 'particularity' language 'is too narrow an approach and fails to take account of the general

simplicity and flexibility contemplated by the rules.' " *Christidis v. First Pennsylvania Mortgage Trust*, 717 F.2d 96, 100 (3rd Cir. 1983), *quoting* C. Wright and A. Miller, *Federal Practice & Procedure*, §1298 at 407. The purposes of Rule 9(b) are to "place the defendants on notice of the precise misconduct with which they are charged, and to safeguard defendants against spurious charges of immoral and fraudulent behavior." *Seville Industrial Machinery Corp. v. Southmost Machinery Corp.*, 742 F.2d 786, 791 (3rd Cir. 1984). It is sufficient that the allegation of fraud "adequately describe the nature and subject of the alleged misrepresentation." *Id.*

Faced with the identical issue in a related case, this court refused to dismiss Touche Ross' complaint against IVB and Girard Bank on the grounds that the complaint's fraud claims were too vague. *In re DASI*, Civ. No. 84-3016, slip op. (January 10, 1985). The court is not prepared to reiterate all of the complaint's allegations at this time. But it has reviewed those allegations carefully, and in light of the Third Circuit's liberal standard on Rule 9(b), the court finds that the plaintiff class' complaint against defendants Kahlowsky and Cunicelli does plead fraud with sufficient particularity to give these defendants "ample notice of the facts underlying [this action]." *Id.*

Finally, the court need not reach the issue of whether the pendent state claims ought to be dismissed, since the federal claims will be retained and not dismissed.

The court will enter an order denying defendants' motion to dismiss the complaint.

STANLEY S. BROTMAN, U.S.D.J.

Dated: April 29, 1986

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

IN RE: DATA ACCESS SYSTEMS SECURITIES LITIGATION	:	MASTER FILE NO. 81-1923
THIS DOCUMENT RELATES TO: ALL CASES	:	ORDER

This matter having come before the court on the 18th day of April, 1986; and

The court having considered the submissions and arguments of the parties; and

For the reasons stated in the court's opinion filed this date,

It is on this 29th day of April, 1986, hereby ORDERED that defendants Roger A. Tolins, Esq., Tolins & Lowenfels, I. Kahlowsky & Co. and Peter Cunicelli's motions to dismiss the Third Consolidated Amended Class Action Complaint are *DENIED*.

No costs.

STANLEY S. BROTMAN, U.S.D.J.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 87-5205

IN RE:

DATA ACCESS SYSTEMS SECURITIES LITIGATION

MICHAEL VITIELLO (81-1923), STANLEY SHERIN (81-1945), PAMELA MARTIN (81-2026) J. H. LEVIT (81-2044), GILES FRANKLIN (81-2045), IRWIN KURLANDER (81-2068), PETER DONIGER (81-2069), ALEXANDRIA A. RICHARDSON (81-2940), STEVEN STONE (81-2947), ERNEST GREENBERG (81-3039), CARMEN PECORARO (81-2341), HJALMAR S. SUNDIN (81-3924), RAYMOND FASTEAU (81-3151), ERROLL STOLTZ (81-3151), MARVIN NOTT (81-3531), JOHN INFANTE (82-315)

vs.

GERALD R. CICCONI, ROBERT T. COPPOLETTA, BENEDICT H. PARATORE, HOWARD B. CRYSTAL, JAMES T. SIMPSON, PHILIP HARTLEY, THOMAS COPPOLETTA, JOHN J. WILK, FRANK LOCKWOOD, PAUL MATZKO, ROBERT B. FRANKLIN, MICHAEL J. HAGGERTY, PETER V. DIGUILIO, ANTHONY J. SIMEI, MARIO CAPONEGRO, GERALD LAVINE, DOUGLAS KREINER, CLARENCE REED, MICHAEL EVANGELISTA,

JOHN GAULT, RUSSELL HETTINGER, SAMAY INDUSTRIES, INC., E-O DATA CORP., CAMBRIA CORP., J&J PROPERTIES, GAULT ASSOCIATES, INC., TRANSNET CORP., D&R CONTRACTORS, JOHNSON-FERNE CORP., MARK SERV CO., TOUCHE ROSS & CO., and D.H. WALLACH, INC., DATA ACCESS SYSTEMS, INC.

TOUCHE ROSS & CO.,
3rd PARTY PLT.

vs.

OLYMPIC INTERNATIONAL LEASING CO., OIL II, INC. and PETER BARZO: INDUSTRIAL VALLEY BANK & TRUST CO.

3rd PARTY DEFTS.

TOLINS & LOWENFELS & ROGER A. TOLINS,
APPELLANTS

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 87-5385

IN RE:

DATA ACCESS SYSTEMS SECURITIES LITIGATION

MICHAEL VITIELLO (81-1923), STANLEY SHERIN (81-1945), PAMELA MARTIN (81-2026) J. H. LEVIT (81-2044), GILES FRANKLIN (81-2045), IRWIN KURLANDER (81-2068), PETER DONIGER (81-2069), ALEXANDRIA A. RICHARDSON (81-2940), STEVEN STONE (81-2947), ERNEST GREENBERG (81-3039), CARMEN PECORARO (81-2341), HJALMAR S. SUNDIN (81-3924), RAYMOND FASTEAU (81-3151), ERROLL STOLTZ (81-3151), MARVIN NOTT (81-3531), JOHN INFANTE (82-315)

vs.

GERALD R. CICCONI, ROBERT T. COPPOLETTA, BENEDICT H. PARATORE, HOWARD B. CRYSTAL, JAMES T. SIMPSON, PHILIP HARTLEY, THOMAS COPPOLETTA, JOHN J. WILK, FRANK LOCKWOOD, PAUL MATZKO, ROBERT B. FRANKLIN, MICHAEL J. HAGGERTY, PETER V. DIGUILIO, ANTHONY J. SIMEI, MARIO CAPONEGRO, GERALD LAVINE, DOUGLAS KREINER, CLARENCE REED, MICHAEL EVANGELISTA, JOHN GAULT, RUSSELL HETTINGER, SAMAY INDUSTRIES, INC., E-O DATA CORP., CAMBRIA

CORP., J&J PROPERTIES, GAULT ASSOCIATES, INC., TRANSNET CORP., D&R CONTRACTORS, JOHNSON-FERNE CORP., MARK SERV CO., TOUCHE ROSS & CO., and D.H. WALLACH, INC., DATA ACCESS SYSTEMS, INC.

TOUCHE ROSS & CO.,
3rd PARTY PLT.

vs.

OLYMPIC INTERNATIONAL LEASING CO., OIL II, INC. and PETER BARZO: INDUSTRIAL VALLEY BANK & TRUST CO.
3rd PARTY DEFTS.

I. KAHLOWSKY AND CO. and
PETER CUNICELLI,
APPELLANTS

(D. C. Civil No. 81-1923)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY — CAMDEN

Present: GIBBONS, *Chief Judge* and SEITZ, WEIS, HIGGINBOTHAM, SLOVITER, BECKER, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA and ALDISERT, *Circuit Judges*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel November 19, 1987 and reargued before the Court in banc March 8, 1988.

On consideration whereof, it is now here ordered and adjudged by this Court that the order of the said District Court, entered April 30, 1986 as amended by the order of the said District Court entered January 6, 1987 certifying the order to this Court pursuant to 28 U.S.C. §1292(b), be, and the same is hereby reversed insofar as New Jersey's six year statute of limitation period for fraud was borrowed and the cause is remanded to the said

District Court for further proceedings consistent with the opinion of this Court. Costs taxed against the appellees.

ATTEST:
Clerk

April 8, 1988

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Nos. 87-5205 and 87-5385

IN RE: DATA ACCESS SYSTEMS SECURITIES LITIGATION

Tolins, et al, Appellants in No. 87-5205

Kahlowsky, et al, Appellants in No. 87-5385

Pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure, it is O R D E R E D that issuance of the certified judgment in lieu of formal mandate in the above cause be, and it is hereby stayed until July 7, 1988.

Aldisert, Circuit Judge

Dated: April 27, 1988

APPENDIX E

Section 9(e) of the Securities Exchange Act, 15 U.S.C. §78i(e)

Manipulation of security prices

* * *

(e) Any person who willfully participates in any act or transaction in violation of subsections (a), (b), or (c) of this section, shall be liable to any person who shall purchase or sell any security at a price which was affected by such act or transaction, and the person so injured may sue in law or in equity in any court of competent jurisdiction to recover the damages sustained as a result of any such act or transaction. In any such suit the court may, in its discretion, require an undertaking for the payment of the costs of such suit, and assess reasonable costs, including reasonable attorneys' fees, against either party litigant. Every person who becomes liable to make any payment under this subsection may recover contribution as in cases of contract from any person who, if joined in the original suit, would have been liable to make the same payment. No action shall be maintained to enforce any liability created under this section, unless brought within one year after the discovery of the facts constituting the violation and within three years after such violation.

Section 18(c) of the Securities Exchange Act, 15 U.S.C. §78r(c)

Liability for misleading statements

* * *

(c) No action shall be maintained to enforce any liability created under this section unless brought within one year after the discovery of the facts constituting the cause of action and within three years after such cause of action accrued.

Section 29(b) of the Securities Exchange Act, 15 U.S.C. §78cc(b)

Validity of contracts

* * *

(b) Every contract made in violation of any provision of this chapter or of any rule or regulation thereunder, and every contract (including any contract for listing a security on an exchange) heretofore or hereafter made, the performance of which involves the violation of, or the continuance of any relationship or practice in violation of, any provision of this chapter or any rule or regulation thereunder, shall be void (1) as regards the rights of any person who, in violation of any such provision, rule, or regulation, shall have made or engaged in the performance of any such contract, and (2) as regards the rights of any person who, not being a party to

such contract, shall have acquired any right thereunder with actual knowledge of the facts by reason of which the making or performance of such contract was in violation of any such provision, rule, or regulation: *Provided*, (A) That no contract shall be void by reason of this subsection because of any violation of any rule or regulation prescribed pursuant to paragraph (2) or (3) of subsection (c) of section 78*o* of this title, and (B) that no contract shall be deemed to be void by reason of this subsection in any action maintained in reliance upon this subsection, by any person to or for whom any broker or dealer sells, or from or for whom any broker or dealer purchases, a security in violation of any rule or regulation prescribed pursuant to paragraph (1) of subsection (c) of section 78*o* of this title, unless such action is brought within one year after the discovery that such sale or purchase involves such violation and within three years after such violation.

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
HONORABLE STANLEY S. BROTMAN

IN RE: DATA ACCESS SYSTEMS SECURITIES LITIGATION	MASTER FILE NO. 81-1923
THIS DOCUMENT RELATES TO ALL CASES	

PLAINTIFFS' THIRD CONSOLIDATED AMENDED CLASS ACTION COMPLAINT

The plaintiff class as certified by this Court by Order dated September 20, 1984, by its undersigned counsel, hereby complains against additional defendants I. Kahlowsky & Co., Peter Cunicelli, Tolins & Lowenfels, Roger A. Tolins, OIL II, Inc., Olympic International Leasing Co., and Peter Barzo as follows:

JURISDICTION AND VENUE

1. The jurisdiction and venue of this Court are based upon the jurisdiction and venue supporting the claims asserted in plaintiffs' second consolidated

amended class action complaint (hereafter "plaintiffs' complaint"). A true and correct copy of plaintiffs' complaint is annexed hereto as Exhibit A, and its allegations are incorporated herein by reference. The actions herein complained of arose out of the actions complained of in plaintiffs' complaint.

PARTIES

2. The plaintiff class certified by this Court by Order dated September 20, 1984, has filed a second consolidated amended class action complaint (Exhibit A annexed hereto) against, *inter alia*, defendant Data Access Systems Inc. (hereafter "DASI"), alleging that DASI and others violated various federal securities laws, the Racketeer Influenced and Corrupt Organizations Act ("RICO"), and applicable state and common law.

3. Additional defendant I. Kahlowsky & Co. ("Kahlowsky") is a partnership engaged in the practice of public accountancy, which during some or all of the periods referred to in plaintiffs' complaint rendered auditing and/or other accounting services to defendant Mark Serv, as well as to defendants E-O Data Corp. ("E-O"), Samay Industries, Inc. ("Samay") (formerly known as Mark Serv Corp.), Gerald R. Cicconi, Peter V. DiGuilio ("DiGuilio") and other related persons and entities. Additional defendant Peter Cunicelli ("Cunicelli") is a resident of the Commonwealth of Pennsylvania and is a partner of Kahlowsky.

4. Additional defendant Tolins & Lowenfels was, at all times relevant hereto, a partnership engaged in the practice of law in the State of New York with offices at 540 Madison Avenue, New York, New York.

5. Additional defendant Roger A. Tolins ("Tolins") is a resident of the State of New York. At all times relevant hereto, Tolins was an attorney-at-law and a partner of the firm of Tolins & Lowenfels.

6. Upon information and belief, additional defendant OIL II, Inc. ("OIL") is a California corporation with a place of business in San Francisco, California.

7. Upon information and belief, additional defendant Olympic International Leasing Co. ("Olympic") is a California partnership with a place of business in San Francisco, California.

8. Upon information and belief, additional defendant Peter Barzo ("Barzo"), during some of all of the periods referred to in plaintiffs' complaint, owned and controlled OIL and Olympic. OIL and Olympic are collectively sometimes referred to hereafter as "the Barzo entities."

COUNT I

AGAINST KAHLOWSKY AND CUNICELLI ONLY

BREACH OF SECURITIES LAWS

9. Plaintiffs repeat and reallege each and every allegation set forth in ¶¶1-8 hereof.

10. During the audit examinations of DASI's financial statements performed by defendant Touche Ross and referred to in plaintiffs' complaint, Touche Ross requested Kahlowsky and Cunicelli, as Mark Serv's auditors, to provide information concerning Mark Serv's business dealings with DASI. Touche Ross requested, among other things, information concerning the existence of any DASI guarantees and direct or contingent liabilities undertaken by DASI to Mark Serv or to Mark Serv's lending banks.

11. In response to the foregoing inquiries, Kahlowsky and Cunicelli advised Touche Ross, *inter alia*, that there were no liabilities and guarantees on the part of DASI to the Mark Serv lending banks, and that said banks were not relying upon DASI or upon any obligation undertaken by DASI as security for their loans to Mark Serv.

12. Upon information and belief, Kahlowsky and Cunicelli knew at the time of making said representations to Touche Ross that, in fact, the Mark Serv lending banks were relying on DASI's obligations to Mark Serv under certain printed lease agreements as security for their loans to Mark Serv; that said lease agreements were assigned as security to those banks; and that DASI was contingently liable to those banks.

13. In October 1978, November 1979, and October 1980, Touche Ross issued audit reports concerning its examination of DASI's consolidated financial statements and schedules.

14. Certain DASI financial statements examined or reviewed by Touche Ross were materially false and misleading, and concealed DASI's true financial condition by improperly reporting, *inter alia*, the foregoing business dealings among DASI, Mark Serv, and others, with respect to leased computer terminals and equipment. Upon information and belief, Kahlowsky and Cunicelli, in violation of their duty to disclose such information, knowingly, intentionally, falsely, fraudulently, and/or recklessly misrepresented and failed to disclose to Touche Ross material facts with respect to DASI including, among other things, DASI's obligations and liabilities to Mark Serv and to Mark Serv's lending banks. In addition, Kahlowsky and Cunicelli, as auditors for E-O, Samay, Met-Fab Corporation, and Bubble Systems Corporation, willfully and/or recklessly misrepresented and failed to disclose to Touche Ross material facts with respect to those companies' business dealings with DASI.

15. Upon information and belief, Kahlowsky and Cunicelli made their misrepresentations intending that Touche Ross and plaintiffs rely on them, and in furtherance of a plan, combination, and conspiracy among DASI, the individual defendants, Mark Serv, Kahlowsky, Cunicelli, and others to issue false financial statements and to induce Touche Ross to issue the above-mentioned audit reports. Kahlowsky and Cunicelli have actively participated in, and have aided and abetted, a conspiracy among the DASI principals and the others identified *supra* to

defraud plaintiffs and the class, in violation of Section 10(b) of the Securities Exchange Act of 1934, and Rule 10b-5 promulgated thereunder by the Securities and Exchange Commission, 17 C.F.R. §240.10b-5, for all of which acts described *supra* Kahlowsky and Cunicelli are liable to plaintiffs and to the class.

COUNT II

AGAINST KAHLOWSKY AND CUNICELLI ONLY

COMMON LAW FRAUD

16. Plaintiffs repeat and reallege each and every allegation set forth in ¶¶1-15 hereof.

17. By virtue of the foregoing, Kahlowsky and Cunicelli, together with DASI, the individual defendants, Mark Serv, and others have willfully conspired to deceive and defraud and have deceived and defrauded, *inter alia,* all those who reasonably relied on said DASI financial statements audited by Touche Ross, including plaintiffs and the class. At various times during the class period, DASI, Mark Serv, the individual defendants, Kahlowsky, Cunicelli, and others willfully concealed from Touche Ross material aspects of Mark Serv's business dealings with DASI, including, but without limitation, the existence of DASI's liabilities to Mark Serv and to Mark Serv's lending banks.

18. The effect of Kahlowsky's and Cunicelli's willful deception was to defraud and mislead all those

who reasonably relied on the DASI financial statements audited by Touche Ross, including plaintiffs and the class, for which Kahlowsky and Cunicelli are liable in fraud and misrepresentation to plaintiffs and to the class.

COUNT III

AGAINST KAHLOWSKY AND CUNICELLI ONLY

NEGLIGENCE

19. Plaintiffs repeat and reallege each and every allegation set forth in ¶¶1-18 hereof.

20. With respect to fiscal years ended August 31, 1978, August 31, 1979, and August 31, 1980, and at all times material hereto, DASI engaged Touche Ross to perform audit examinations of, and to issue audit reports upon, certain DASI financial statements prepared by DASI and by the individual defendants. In connection with said audit examinations, Kahlowsky and Cunicelli negligently and/or recklessly made misrepresentations to Touche Ross concerning Mark Serv's business dealings with DASI. Kahlowsky's and Cunicelli's negligent and/or reckless acts included, among other things, transmitting false information to Touche Ross concerning the existence of any DASI guarantees and direct or contingent liabilities undertaken by DASI to Mark Serv or to Mark Serv's lending banks. Kahlowsky and Cunicelli intended that Touche Ross and plaintiffs rely on these false representations, and knew

or recklessly disregarded the fact that Touche Ross would rely on them in connection with its audit examination of the DASI financial statements. Kahlowsky and Cunicelli owed (1) Touche Ross, (2) plaintiffs and (3) the class a duty to disclose all material facts concerning Mark Serv's business dealings with DASI, and to refrain from negligently or recklessly misrepresenting the nature and terms of those business dealings.

21. During the course of Touche Ross' audit examination of the DASI financial statements, Kahlowsky and Cunicelli negligently and/or recklessly misrepresented to Touche Ross the true nature of Mark Serv's business dealings with DASI. In particular, but without limitation, Kahlowsky and Cunicelli failed to disclose to (1) Touche Ross, and through them, to (2) plaintiffs and (3) the class, material facts concerning DASI's liabilities to Mark Serv and to Mark Serv's lending banks. The effect of Kahlowsky's and Cunicelli's material nondisclosures was to mislead all those, including plaintiffs and the class, who reasonably and foreseeably relied on the DASI financial statements audited by Touche Ross; for which Kahlowsky and Cunicelli are liable in negligence to plaintiffs and the class.

COUNT IV

AGAINST TOLINS & LOWENFELS AND TOLINS ONLY

BREACH OF SECURITIES LAWS

22. Plaintiffs repeat and reallege each and every allegation set forth in ¶¶1-21 hereof.

23. In or about August 1978, DASI retained Tolins & Lowenfels and Tolins to represent it in connection with a proposed public offering of its common stock, and specifically, to assist DASI in preparing and filing a registration statement (the "registration statement") and certain amendments thereto covering the securities to be sold to the public. The public offering duly took place in February 1979. DASI also retained Tolins & Lowenfels and Tolins to assist DASI in preparing and filing Form 10-K's for DASI's fiscal years ending August 31 for the years 1978, 1979 and 1980 (hereafter "the DASI 10-K's").

24. In or about September through November 1978, Tolins actively participated in the preparation of the DASI registration statement. Tolins engaged in discussions with (1) the DASI principals, (2) the DASI underwriter, D.H. Wallach, Inc., (3) Frank Lockwood, an employee of D.H. Wallach, Inc., (4) Touche Ross, and others; conducted a review of documentation; and drafted the registration statement. After engaging in similar discussions with these same persons and entities, Tolins drafted the DASI 10-K's.

25. On or about February 14, 1979, DASI filed with the Securities and Exchange Commission its registration statement in connection with its public offering. DASI's 10-K's were likewise filed with the Securities and Exchange Commission. DASI's registration statement and DASI's 10-K's, in language drafted by Tolins, variously represented:

(a) That as of August 31, 1978, Mark Serv had purchased new computer terminal systems from DASI for the cash price of $2,357,000 in the 1978 fiscal year; $3,300,000 in the 1979 fiscal year, and $5,000,000 in the 1980 fiscal year;

(b) That the computer terminal systems were sold to Mark Serv in the 1978 and 1979 fiscal years in $250,000 blocks, with associated leases (between DASI and its customers) in $250,000 blocks, and in $500,000 blocks in the 1980 fiscal year;

(c) That DASI provided maintenance and service on the equipment;

(d) That at Mark Serv's request, DASI collected rental payments from Mark Serv's customers, retained the portion of the rental payments in excess of the amounts due Mark Serv, and remitted the remainder to Mark Serv;

(e) That DASI had no further liability to Mark Serv except for service and maintenance obligations;

(f) That if a DASI customer defaulted under its lease, DASI would attempt but had no obligation to place the equipment with another customer or sell the equipment;

(g) That 80% of the funds used by Mark Serv to purchase terminal systems were provided by bank loans, guaranteed by Cicconi or DiGuilio and/or unrelated parties, with the bank obtaining an assignment of the leases (between DASI and its customers) and lease proceeds and a security interest in the lease equipment;

(h) That the Mark Serv cluster transactions, although not at arm's length, were comparable to those which could be negotiated with unrelated parties and were beneficial to DASI; and

(i) That subsequent to the 1978 fiscal year, Mark Serv had purchased similar equipment through similar transactions for $1,550,000.

26. The February 14, 1979 DASI registration statement and the DASI 10-K's, in language also drafted by Tolins, variously represented:

(a) That, effective August 31, 1978 and November 30, 1978, DASI had closed a cluster transaction with Olympic in the aggregate amount of $500,000;

(b) That during the 1979 and 1980 fiscal years, DASI had entered into three transactions with defendant Transnet Corp. ("Transnet") in the aggregate amount of $3.25 million; and

(c) That the Olympic and Transnet transactions were similar in form to those with Mark Serv.

27. The February 14, 1979 DASI registration statement and the DASI 10-K's were materially false and misleading in the following respects:

(a) They failed to reveal that DASI had potential liability to Mark Serv, Olympic, and Transnet in the event its customers defaulted, or it was unable to re-lease the so-called "equipment clusters" to another customer before the term of the printed lease agreement expired;

(b) They failed to reveal that Mark Serv had represented to its lending banks that the printed lease agreement was a valid lease, which was enforceable according to its terms;

(c) They failed to reveal that Olympic and Transnet had interpreted the printed lease agreement as being a valid lease, which was enforceable according to its terms;

(d) They failed to reveal that the funds borrowed by Mark Serv, allegedly to purchase the equipment clusters, were secured by assignments of printed lease agreements which, on their face, were to be with recourse to DASI and were not qualified by the terms of the typed master agreement that stated that the transaction was without recourse to DASI; and

(e) They failed to reveal that cluster transactions could not be accounted for as sales, since DASI retained substantial risks of ownership

because of the lease-back of the equipment clusters from Mark Serv, Olympic, and Transnet.

28. Based on his investigation into the accuracy of the disclosures made in the DASI February 14, 1979 registration statement and the DASI 10-K's, Tolins knew or recklessly disregarded the following:

(a) That the documentation concerning the Mark Serv cluster transactions was ambiguous, and had been negotiated between Ciconni, on behalf of Mark Serv, and Edward Testa ("Testa") on behalf of DASI;

(b) That Testa had thereafter resigned his position with DASI, simultaneously purchasing the Ameray Corporation, a DASI subsidiary, at a bargain price, and receiving payment of $75,000 in consideration of the termination of his employment contract with DASI;

(c) That, owing to his general partnership interest in Mark Serv and his guarantee of certain Mark Serv loans, Ciconni had significant personal liability in the event a DASI customer defaulted, or the equipment otherwise came off lease and could not be re-leased to another DASI customer, thus causing Mark Serv to default on its bank loans;

(d) That the ambiguous Mark Serv documentation was not amenable to interpretation other

than through Ciconni, who had a personal interest in increasing DASI's exposure in order to lessen his own exposure;

(e) That the two principal documents in the possession of Tolins concerning the Mark Serv cluster transactions—the typed master agreement and the printed lease agreement—were contradictory; and that Ciconni's representation that the lease agreement was not a true lease was suspect;

(f) That the terms of a similar transaction Tolins had negotiated on behalf of Amboy Capital Corp. with DASI in 1976 provided for a sale/lease-back transaction;

(g) That DASI had executed similar printed lease agreements with Mark Serv for the purpose of leasing other equipment from Mark Serv;

(h) That Ciconni had continually resisted any disclosure of the Mark Serv transactions in the registration statement;

(i) That Ciconni had continually resisted any revision of the Mark Serv cluster transaction documents which would have eliminated the acknowledged ambiguity in the documents and would have reflected the purported intent of the parties;

(j) That the examination conducted by Tolins of documentation relating to each cluster transaction closed in the 1978 fiscal year, conducted for the purpose of insuring that each printed lease

agreement referred to the typed master agreement, was incomplete because it was based on incomplete documentation;

(k) That Ciconni had refused to honor the request of Tolins to produce documentation concerning the Mark Serv financing;

(l) That Mark Serv had assigned its rights under the printed lease agreement (which were to be with recourse to DASI) to its banks as collateral for the bank loans which financed the cluster transactions;

(m) That the language of the typed master agreement contradicted Cicconi's representation that Tolins had been given all cluster transaction documents signed by DASI;

(n) That representations had been made to Tolins that, because of the non-recourse nature of the cluster transactions, the cluster transactions were more favorable to DASI than transactions which could be arranged with independent third parties; and

(o) That the DASI directors had authorized the leasing of terminal clusters from third parties and vendors in April 1979.

29. If Tolins had performed the due diligence procedures that his firm, Tolins & Lowenfels, had been retained to perform, and if he had requested and reviewed all of the documentation concerning the Mark Serv cluster transactions that he should

have reviewed, including the DASI Board of Directors' minutes for the 1978 fiscal year, Tolins would have discovered the following:

(a) That certain printed lease agreements executed by DASI did not refer to the typed master agreement and therefore were not modified by its terms;

(b) That certain documents among the bank financing documentation supposedly executed by Mark Serv, referred to in the typed master agreement, were in fact executed by DASI rather than by Mark Serv, the supposed owner of the computer equipment;

(c) That the bank financing documentation indicated that the printed lease agreement was a valid agreement, enforceable according to its terms;

(d) That the DASI directors had authorized the leasing of terminal clusters from Mark Serv in April 1978; and

(e) That DASI retained substantial risks of ownership relating to the equipment clusters allegedly sold to Mark Serv.

30. Based upon his investigation of the DASI-Olympic cluster transactions, Tolins knew or recklessly disregarded the fact that the typed Olympic master agreement omitted the crucial provisions of the typed Mark Serv master agreements which Cicconi had identified as showing nonrecourse nature of the transactions.

31. If Tolins had performed the due diligence procedures that his firm Tolins & Lowenfels had been retained to perform, and if he had requested and reviewed all of the documentation concerning the Olympic cluster transactions for the 1978 fiscal year that he should have reviewed, Tolins would have discovered the following:

(a) That printed lease agreements similar to those executed in connection with the Mark Serv cluster transactions had been executed in connection with the Olympic cluster transactions;

(b) That Cicconi had written Barzo suggesting that the non-recourse nature of the transaction be separately documented; and

(c) That Barzo had responded by a letter, dated September 25, 1978, counter-signed by Cicconi on behalf of DASI, which reflected an agreement that Olympic would in fact have recourse against DASI under the Olympic lease agreement.

32. If Tolins had performed the due diligence that his firm Tolins & Lowenfels and been retained to perform, and if he had requested and reviewed all of the documentation concerning the Olympic and/or OIL cluster transactions for the 1979 and 1980 fiscal years that he should have reviewed, Tolins would have discovered the following:

(a) That DASI had entered into additional cluster transactions with Olympic and/or OIL in the aggregate amount of at least $4.75 million; and

(b) That these additional Olympic and/or OIL cluster transactions were with recourse against DASI in the event DASI's customers defaulted or DASI was unable to re-lease the so-called "equipment clusters" to another customer before the term of the printed lease agreement expired.

33. In or about June 1979, Cicconi asked Tolins to draft an agreement for a proposed cluster transaction between DASI and Transnet and to review the proposed bank financing documents to be certain that the transaction was structured as a sale rather than a sale/lease-back.

34. After preparing an agreement for the Transnet cluster transaction, and despite the fact that Tolins knew that Cicconi intended to structure the Transnet cluster transaction in a manner identical to the Mark Serv cluster transactions, Tolins deliberately avoided making inquiries to determine what additional documentation had been executed by DASI and Transnet in connection with the Transnet cluster transaction and, specifically, to determine whether a printed lease agreement similar to that executed in connection with the Mark Serv cluster transactions had been executed in connection with the Transnet cluster transactions.

35. In connection with the financing for the Transnet cluster transaction, Tolins was also requested by Cicconi to deliver an opinion to Transnet's bank, Americal National Bank & Trust of New Jersey ("ANBT"), that the transaction had been validly authorized by DASI's board of directors and did not violate DASI's credit agreements. Although Tolins was aware that if the transaction was with recourse it would violate DASI's credit agreements and was aware of the fact that he had not reviewed all of the documentation relating to the transaction, Tolins caused his firm Tolins & Lowenfels to issue the requested opinion.

36. If Tolins had performed the due diligence procedures that his firm Tolins & Lowenfels had been retained to perform, and if he had requested and reviewed all of the documentation concerning the Transnet cluster transactions that he should have reviewed, he would have discovered that printed lease agreements similar to those executed in connection with the Mark Serv cluster transactions, and which directly contradicted the non-recourse language Tolins had drafted in the Transnet agreement, had been executed in connection with the Transnet cluster transactions.

37. As special counsel to Transnet, Tolins & Lowenfels and Tolins were retained by Transnet to assist it in preparing and filing Transnet's Form 10-K for its fiscal years ending June 30 for the years 1979, 1980, and 1981 (hereafter the "Transnet 10-K's"). In that capacity Tolins drafted the Transnet

10-K's, which represented that the Transnet cluster transactions were purchases of terminal clusters from DASI, and was instrumental in convincing Transnet's auditors that these transactions could be accounted for as purchases by Transnet.

38. As a result of the accounting treatment given to the Transnet cluster transactions in the Transnet 10-K's, the DASI principals and others were able to conceal the true nature of these transactions from Touche Ross, plaintiffs, and the class.

39. Tolins knew that the representations made in the February 14, 1979 DASI registration statement and in the DASI 10-K's were false and misleading, and/or recklessly disregarded the inaccuracy of those statements.

40. Tolins and Tolins & Lowenfels have actively participated in, and have aided and abetted, a conspiracy among the DASI principals and the others identified *supra* to defraud plaintiffs and the class, and/or were substantial participants in the sale of DASI securities to plaintiffs and the class by means of a false and misleading prospectus, in violation of Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 promulgated thereunder by the Securities and Exchange Commission; for all of which acts described *supra* Tolins and Tolins & Lowenfels are liable to plaintiffs and the class.

COUNT V

AGAINST TOLINS & LOWENFELS AND TOLINS ONLY

COMMON LAW FRAUD

41. Plaintiffs repeat and reallege each and every allegation set forth in ¶¶1-40 hereof.

42. In connection with DASI's 1979 public offering of its common stock, and in connection with the drafting and filing of DASIs 10-K's, Tolins & Lowenfels and Tolins in conspiracy with the others identified *supra* made material misrepresentations to plaintiffs, the class, Touche Ross, and to D.H. Wallach, Inc. and its counsel concerning the business dealings of Mark Serv, Olympic, OIL, and Transnet, including, among other things, transmitting false information concerning the so-called cluster transactions.

43. Tolins & Lowenfels and Tolins knew that those misrepresentations would be used and relied upon by plaintiffs, the class, and Touche Ross in connection with its audit examination of the DASI financial statements and by D.H. Wallach, Inc. and its counsel in performing their due diligence investigation of the narrative description of the cluster transactions in the DASI February 14, 1979 registration statement, and plaintiffs and the class in making their investment decisions. Tolins & Lowenfels and Tolins made those misrepresentations knowingly, fraudulently, and with intent to deceive plaintiffs, the class, Touche Ross, D.H. Wallach,

Inc. and its counsel, and others who reasonably relied on the said DASI financial statements audited by Touche Ross, on the narrative portion of the DASI February 14, 1979 prospectus, and on the DASI 10-K's, for all of which acts Tolins & Lowenfels and Tolins are liable to plaintiffs and to the class in fraud.

COUNT VI

AGAINST TOLINS & LOWENFELS AND TOLINS ONLY

NEGLIGENCE

44. Plaintiffs repeat and reallege each and every allegation set forth in ¶¶1-43 hereof.

45. Upon information and belief, at all times relevant hereto, Tolins & Lowenfels and Tolins represented themselves to have the learning, knowledge, skill, care, and diligence ordinarily possessed and exercised by those holding themselves out as attorneys-at-law, and further held themselves out as having specialized skills, knowledge, and competence in the fields of corporate and securities law generally. In connection with the DASI 10K's, Tolins & Lowenfels and Tolins made representations to the class and Touche Ross concerning transactions engaged in between DASI and Mark Serv Co., Olympic, OIL, and Transnet, including, among other things, information concerning the so-called cluster transactions. Tolins & Lowenfels and Tolins knew and/or reasonably foresaw that

those representations would be used and relied upon by the class and Touche Ross in connection with its audit examinations of certain financial statements of DASI and subsidiaries. Furthermore, Tolins & Lowenfels and Tolins knew and/or reasonably foresaw that such representations would be used and relied upon by Touche Ross in connection with its audit examination of certain financial statements of DASI and subsidiaries. Furthermore, Tolins & Lowenfels and Tolins knew and/or reasonably foresaw that such representations would, in turn, be relied upon by plaintiffs and the class. The representations were in fact transmitted to plaintiffs and the class through the DASI February 14, 1979 Prospectus and the DASI 10-K's or annual reports. Tolins & Lowenfels and Tolins were consequently under a duty to plaintiffs and the class, Touche Ross, and to D.H. Wallach, Inc. and its counsel not to misrepresent the facts and to disclose all material facts concerning those transactions.

46. By virtue of the foregoing, Tolins & Lowenfels and Tolins owed to (1) plaintiffs and the class, (2) Touche Ross, and (3) D.H. Wallach, Inc. and its counsel, a duty to disclose all material facts concerning the business dealings of Mark Serv, Olympic, OIL, and Transnet with DASI, and to refrain from misrepresenting those business dealings.

47. During the course of preparing the DASI 10-K's and Prospectus referred to above, and the aforesaid audit examination conducted by Touche Ross and the due diligence investigation conducted

by D.H. Wallach, Inc. and its counsel, Tolins & Lowenfels and Tolins negligently and/or recklessly failed to disclose material aspects of the business dealings of Mark Serv, Olympic, OIL, and Transnet with DASI and negligently and/or recklessly misrepresented those business dealings. In particular, Tolins & Lowenfels and Tolins negligently and/or recklessly misrepresented and failed to disclose material facts concerning the cluster transactions, and concerning DASI's liabilities to Mark Serv, Olympic, OIL, and Transnet and to their lending banks; which misrepresentations were contained in, and which omissions were omitted from, the DASI February 14, 1979 prospectus and DASI 10-K's delivered by D.H. Wallach, Inc. and DASI to plaintiffs and the class; for all of which acts described *supra* Tolins and Tolins & Lowenfels are liable in negligence to plaintiffs and to the class.

COUNT VII

AGAINST PETER BARZO, OIL II INC., AND OLYMPIC INTERNATIONAL LEASING CO. ONLY

BREACH OF SECURITIES LAWS

48. Plaintiffs repeat and reallege each and every allegation set forth in ¶¶1-47 hereof.

49. During some or all of the periods referred to in plaintiffs' complaint, additional defendants Barzo, OIL, and Olympic, as well as defendants Mark Serv, Transnet, and others engaged in transactions with

defendant DASI, which included, *inter alia*, sales and leases of clusters of computer equipment. In connection with such cluster transactions, additional defendants Barzo, OIL, and Olympic did business within the District of New Jersey.

50. A total of ten or eleven cluster transactions took place between the Barzo entities and DASI, Barzo himself entering into one or two such transactions, OIL entering into seven or eight such transactions, and Olympic entering into one such transaction. The total value of these cluster transactions was not less than $5.25 million.

51. With regard to these cluster transactions, Barzo signed, on behalf of himself and/or OIL and/or Olympic, a printed lease agreement and a typed, so-called "master agreement." The terms of the printed lease agreement contradicted the terms of the typed master agreement. Specifically, the printed lease agreement (1) described the lease as a true lease that was non-cancellable; and (2) contained an integration clause stating that no agreement existed other than the printed lease agreement. The typed master agreement, in contrast, stated that the arrangement was without recourse to DASI, and that if the end user of the equipment did not pay the sums due, then DASI need not pay Barzo and/or OIL and/or Olympic.

52. Knowing that the terms of the typed master agreement were less favorable to Barzo and to the Barzo entities than the printed lease agreement, and that the terms of the two agreements conflicted,

Barzo, at or about the time of the Barzo entities' first cluster transaction with DASI, sent DASI, through Cicconi, a letter dated September 25, 1978. This letter, which Cicconi countersigned on behalf of DASI to indicate agreement, stated, *inter alia*, that "Data Access is to be responsible for payments by Lessees and to assume the credit risk of nonpayment," and that "Data Access guarantees payment by Lessees." The letter's reference to a DASI guarantee was, *inter alia*, a reference to a 4-page Guaranty dated August 31, 1978 and signed by Cicconi on behalf of DASI whereby DASI unconditionally guaranteed the payments due to Olympic respecting the leased computer equipment.

53. DASI, Cicconi, Barzo, and/or OIL and/or Olympic, acting both separately and in conspiracy with one another, deliberately, willfully, knowingly, and with intent to deceive kept secret the existence of the DASI Guaranty and the letter dated September 25, 1978.

54. Despite believing that the terms of the typed master agreement were meaningless, in light of (1) the existence of the DASI Guaranty, (2) the letter dated September 25, 1978, and (3) the printed lease, Barzo and/or OIL and/or Olympic continued thereafter to execute such typed master agreements which falsely narrated that the cluster transactions were without recourse to DASI. In so doing, Barzo and/or OIL and/or Olympic knowingly, willfully, and with intent to deceive participated in and made

possible DASI's fraud upon, *inter alia*, the investment community, plaintiffs, and the class.

55. Barzo's motivation for participating in the DASI fraud centering on the cluster transactions was two-fold: (1) upon leaving his employment with DASI, Barzo had entered into a restrictive covenant with DASI, precluding him from engaging in leasing transactions of the type DASI engaged in, for a period of five years. Barzo's participation in the cluster transactions with DASI provided him with a convenient method of evading the restriction that would otherwise be imposed on him by the restrictive covenant; and (2) exclusive of, and in addition to, the lucrative tax credits and depreciation allowances that Barzo and the Barzo entities acquired by participating in the cluster transactions with DASI, Barzo and the Barzo entities made significant profits therefrom, totalling between $750,000 and $1 million.

56. On information and belief, in 1978 and/or 1979 DASI's auditor, Touche Ross & Co., wrote to Barzo and/or OIL and/or Olympic in connection with its audit examination of the said DASI financial statements. Touche Ross sought written confirmation of the nature of the cluster transactions between DASI and the Barzo entities. Touche Ross asked Barzo and/or the Barzo entities, through Barzo, (1) to set forth in writing the terms of their cluster transactions with DASI; and (2) to confirm that "the attached agreements" were complete and representative samples of all of the written agreements

entered into. Touche Ross attached to its request, as sample agreements, only the printed lease agreement and the typed master agreement, since it did not then know of the existence of the DASI Guaranty or the September 25, 1978 letter.

57. In response to the request from Touche Ross, Barzo, on behalf of himself and/or OIL and/or Olympic, signed documents confirming that the cluster transactions were without recourse to DASI. On the basis of this false information, Touche Ross issued its approval of the said DASI financial statements that were disseminated to plaintiffs and the class. These DASI financial statements, to the detriment of, *inter alia*, plaintiffs and the class, falsely described the DASI-Barzo cluster transactions as "sales."

58. In keeping secret the existence of the DASI guaranty and the letter dated September 25, 1978, in signing a conflicting master agreement, and in making false confirmations to Touche Ross, Barzo and/or OIL and/or Olympic knowingly, willfully, and with intent to deceive misrepresented the nature of their cluster transactions with DASI, and participated in, aided and abetted, and made possible DASI's fraud upon, *inter alia*, the investment community, plaintiffs, and the class. In violation of its duty to disclose such information, and in pursuit of its fraudulent conspiracy with the other defendants, Barzo, OIL, and Olympic knowingly, intentionally, falsely, and fraudulently misrepresented and failed to disclose to Touche Ross significant material facts

concerning their cluster transactions with DASI, particularly the fact that those transactions were with recourse to DASI and not without recourse as the typed master agreement indicated, and were thus not accurately describable as "sales."

59. At the time of making these misrepresentations and willful nondisclosures, Barzo and/or OIL and/or Olympic knew and intended that Touche Ross and the plaintiff class would rely on this false information in connection with the audits of the said DASI financial statements which were disseminated to the investing public. Barzo and/or OIL and/or Olympic made those false confirmations in furtherance of a plan, combination, and conspiracy among DASI, Barzo, and/or OIL and/or Olympic and others to defraud the plaintiffs and the class and to induce Touche Ross to issue favorable reports concerning DASI dated October 1978 and/or November 1979 and/or October 1980, which Barzo and/or OIL and/or Olympic knew would be disseminated to plaintiffs and the class and relied upon by them. In doing so, Barzo and/or OIL and/or Olympic facilitated and/or aided and abetted and/or participated in DASI's fraud, and entered into a conspiracy with DASI and the others identified *supra* to defraud, *inter alia*, all those who reasonably relied on the integrity of the said DASI financial statements, including plaintiffs and the class, in violation of Section 10(b) of the Securities and Exchange Act of 1934 and Rule 10-b promulgated thereunder by the Securities and Exchange Commission; for all of

which acts described *supra*, Barzo and/or OIL and/or Olympic are liable to plaintiffs and the class.

COUNT VIII

AGAINST PETER BARZO, OIL II INC., AND OLYMPIC INTERNATIONAL LEASING CO. ONLY

COMMON LAW FRAUD

60. Plaintiffs repeat and reallege each and every allegation set forth in ¶¶1-59 hereof.

61. In addition to the foregoing, Barzo and/or OIL and/or Olympic, at or about the same time as committing the said misrepresentations and nondisclosures, paid to Peter DiGiulio, a person whom Cicconi and/or Coppoletta had recommended to Barzo as a "consultant," not less than $38,000 for supposed "consulting services." In fact, nothing DiGiulio did inured to Barzo's or the Barzo entities' benefit in any way; these payments were merely pay-offs that Barzo chose to pay DiGiulio to be able to continue participating in the lucrative cluster transactions with DASI. As such, these payments constituted part of the fraudulent scheme described *supra*.

62. By virtue of the their perpetration of the foregoing willful, knowing, and intentional deception, additional defendants Barzo, OIL and Olympic are liable in fraud and misrepresentation to all those who reasonably relied on the said DASI financial statements, including plaintiffs and the class.

COUNT IX

AGAINST PETER BARZO, OIL II INC., AND OLYMPIC INTERNATIONAL LEASING CO. ONLY

NEGLIGENCE

63. Plaintiffs repeat and reallege each and every allegation set forth in ¶¶1-62 hereof.

64. With respect to fiscal years ended August 31 for each of the years 1978, 1979, and 1980, and at all times material hereto, DASI engaged Touche Ross to perform audit examinations of, and to issue audit reports on, certain DASI financial statements that were prepared by DASI and by the individual defendants. In connection with said audit examinations, additional defendants Barzo and/or OIL and/or Olympic made the above-described misrepresentations and nondisclosures to Touche Ross concerning their business dealings with DASI. Said additional defendants intended Touche Ross and plaintiffs to rely upon these misrepresentations and nondisclosures, and knew that Touche Ross would rely on them in connection with its audit examination of the DASI financial statements. Said additional defendants owed a duty to (1) Touche Ross, (2) plaintiffs, and (3) the class to disclose to Touche Ross all material facts concerning their business dealings with DASI, and to exercise due care to insure that their statements did not misrepresent the nature and terms of those business dealings.

65. During the course of the audit examination of the said DASI financial statements conducted and performed by Touche Ross, additional defendants Barzo and/or OIL and/or Olympic negligently and/or recklessly breached their duty to (1) Touche Ross, (2) plaintiffs, and (3) the class by failing to insure that their statements to Touche Ross concerning their business dealings with DASI accurately reflected those business dealings. In particular, but without limitation, additional defendants Barzo and/or OIL and/or Olympic negligently and/or recklessly failed to reveal to Touche Ross and to plaintiffs and the class the true nature of the contingent liability DASI possessed with regard to the cluster transactions, and failed to reveal that those transactions were with recourse to DASI and not without recourse as stated by the typed master agreement; for all of which acts the said additional defendants are liable in negligence to plaintiffs and to the class.

WHEREFORE, plaintiffs on behalf of themselves and the class demand judgment against all the above-named additional defendants for such damages as may be proved at trial, said judgment to include:

(a) Such costs and fees as are allowed by law; and

(b) Such other and further relief as the Court may deem appropriate.

Respectfully submitted,

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(2)

No. 88-54

In The
Supreme Court of the United States
October Term, 1988

MICHAEL VITIELLO,
on behalf of himself and the certified class of
DATA ACCESS SYSTEMS, INC., shareholders,

Petitioner,

v.

I. KAHLOWSKY & Co., PETER CUNICELLI,
TOLINS & LOWENFELS, and
ROGER A. TOLINS,

Respondents.

On Petition for A Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF RESPONDENTS TOLINS & LOWENFELS AND ROGER A. TOLINS IN OPPOSITION

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QUESTION PRESENTED

Whether the Court of Appeals correctly applied recent decisions of this Court in holding that the ''one-year/three-year'' limitation provision found in the Securities Exchange Act of 1934 should be ''borrowed'' for implied private actions under Section 10(b) of that Act.

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STATEMENT OF THE CASE

This case involves allegations of securities fraud by plaintiff-petitioners in the sale of common stock of Data Access Systems, Inc. ("DASI") from October 31, 1978 through June 22, 1981. The latter date is the date on which the claims were held to have accrued by the District Court, *See In re Data Access Systems Securities Litigation*, 103 F.R.D. 130, 150 (D.N.J. 1984), and District Court Slip Opinion below (Pet. App. 57a). The initial complaint herein was filed on June 23, 1981, and the First Consolidated Amended Class Action Complaint (the "First Class Action Complaint") on October 26, 1981. The sole federal claims at issue were asserted under Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b) and SEC Rule 10b-5 promulgated thereunder.

The allegations in the initial complaint and the First Class Action Complaint centered around the 1979 DASI offering prospectus, which was alleged to have been materially false and misleading. Numerous parties were sued in those complaints, including DASI's principal accountants, Touche Ross & Co., the lead underwriter, D. H. Wallach, and others. *Not* named in either complaint were the law firm of Tolins and Lowenfels ("T & L") or attorney Roger A. Tolins, two of the respondents on the instant Petition. This omission cannot be attributed to plaintiffs' ignorance, because the 1979 DASI prospectus explicitly identified Tolins and Lowenfels as "special counsel for [DASI]" who would be "pass[ing] upon" "[l]egal matters in connection with" the common stock offered (DASI Prospectus, p. 61, excerpt at Resp. App. 2-3).

That petitioners' decision not to sue T & L or Tolins initially was deliberate, and not the result of ignorance, excusable or otherwise, was confirmed several months later. On March 15, 1982, a "Special Agent", appointed by the District Court in a civil action brought by the Securities and Exchange Commission (SEC) against DASI, rendered a lengthy report regarding the allegations common to the SEC action and this action. That report identified both Roger Tolins and Lewis Lowenfels as persons providing information to the Special Agent relative to his investigation.

In the wake of the Special Agent's report, petitioners in May 1982 filed a Second Consolidated Amended Class Action Complaint (the "Second Class Action Complaint"). Again, that Complaint failed to name T & L or Tolins as defendants. Moreover, that Complaint contained the following allegation:

> "19. Various other persons, firms, corporations, agents *and attorneys not named or made defendants herein have participated* as co-conspirators in offenses charged in this Complaint and have performed acts and made statements in furtherance thereof. Such persons, firms, corporations, agents *and attorneys did also know of and substantially assisted* in effectuating the unlawful scheme of offenses charged in this Complaint *and did thereby aid and abet therein.*" (Resp. App. 13) (emphasis added).

While the "attorneys" referred to in the above paragraph were not identified, the only attorneys later sued were T & L and Tolins.

Despite their awareness of the identity and role of T & L and Tolins, and of the fact that said parties had

relevant knowledge, plaintiff-petitioners chose not to interview or depose either Tolins or Lowenfels. Rather, petitioners claim that in 1985 they happened to see a copy of a transcript of a 1984 deposition of Tolins taken in another action, which purportedly revealed to them some basis for suing T & L and Tolins. However, Petitioners have consistently failed to identify a single answer given in that deposition which supposedly gave them a previously-unknown basis to sue T & L or Tolins, nor have they explained why they failed to depose Tolins.

The real reason for the belated decision to sue T & L and Tolins appears to be a partial settlement reached in 1985 between petitioners and defendant Touche Ross. Under the terms thereof, embodied in a March 15, 1985 Stipulation of Settlement (See excerpt at Resp. App. 4 *et seq.*), petitioners received 3.25 million dollars from Touche (¶ 2(a)) and agreed to pledge *future* recoveries to a "Recovery Fund", out of which Touche would receive the first $750,000, 50% of the next $2,000,000 and 35% of the next $2,142,857 (¶ 6). Further, Touche acquired an effective "veto" over any settlements under a certain amount (¶ 4(i)), and petitioners indemnified Touche against any liability on cross-claims against Touche by the other defendants, such as respondents herein (¶ 4 (b)). The settlement with Touche was approved by the District Court on July 2, 1985.

The net effect of the settlement with Touche was to create a fund to facilitate petitioners' continuation of the lawsuit, largely to shift control over decision-making from petitioners to Touche, and to create a substantial interest in their finding new supposed "deep pockets" to sue, such as respondents. Thus, the motion to file a "Third

Consolidated Amended Class Action Complaint" (the "Third Class Action Complaint"), naming respondents for the first time, was filed on September 10, 1985, two months after the Touche Ross settlement was approved. The motion was granted, and the Third Class Action Complaint was filed on January 7, 1986, more than 4½ years after the causes of action accrued and the initial complaint was filed, and almost seven (7) years after T & L was identified in the 1979 DASI prospectus. Respondents filed their motion to dismiss the Third Class Action Complaint on limitations grounds on February 20, 1986.

The primary question before the District Court on the dismissal motion was whether New Jersey's two-year Blue Sky Law limitations period should be "borrowed", or whether the State's six-year "catch-all" statute, used *inter alia* in state common law fraud contexts, should be applied. Respondents also urged the District Court to reconsider the borrowing methodology in Section 10(b) cases in light of *Wilson v. Garcia*, 471 U.S. 261 (1985), but did not at that stage argue that a limitations period from the federal securities laws be borrowed, so the latter issue was not before the District Court. The District Court ruled that the six-year State "catch-all" statute applied. The reason for the District Court's ruling was its belief that plaintiffs' allegations did not state a claim under the State Blue Sky Law, because respondents were not the actual "sellers" of DASI stock to plaintiffs, a purported requirement under that statute. The District Court read Third Circuit precedent as requiring the borrowing of the less-preferred catch-all statute used for common law fraud in such a case.

The District Court did not discuss *Wilson v. Garcia* in its opinion. However, it did certify two questions to the Third Circuit for review, and stayed proceedings pending such review. The first certified question raised the issue whether the State Blue Sky Law should be borrowed regardless of whether plaintiffs had effectively stated a claim thereunder. The second question related to whether plaintiffs had in fact stated a claim under the Blue Sky Law against respondents as "sellers", by alleging that they had "substantially participated and/or aided and abetted in the sale of securities to plaintiffs." (Pet. appendix, pp. 6a - 7a).

In their application to the Third Circuit Court of Appeals to bring on the certified appeal, T & L and Tolins relied not only on the *Wilson* case, but also on this Court's decision in *DelCostello v. Teamsters* 462 U.S. 151 (1983), suggesting to the Court of Appeals that it might well wish to consider using federal law as the source of borrowed limitations law in light thereof. When that court took the appeal, respondents briefed the question whether the Federal Securities Acts should be used as a borrowing source, particularly in light of this Court's decision in *Agency Holding Corp. v. Malley-Duff & Associates,* — U.S. — , 107 S.Ct. 2759, 97 L.Ed. 2d 121 (1987) ("*Malley-Duff*"), which was announced in the midst of the briefing process in the Court of Appeals. The borrowing of a federal rather than a State limitations period was the thrust of oral argument before the *in banc* Court of Appeals.

The Court of Appeals' unanimous[1] *in banc* decision to follow *Wilson, DelCostello* and *Malley-Duff,* and to borrow the express limitations period found in the Securities Exchange Act of 1934 in all Section 10(b) cases, represents the first time a court of appeals has considered the question in any detail in light of those recent decisions of this Court. The decision below therefore comes at the beginning of a period when the various courts of appeals will likely reconsider the Section 10(b) borrowing question in light of *Wilson, DelCostello, Malley-Duff,* and the Third Circuit *in banc* decision herein.

While the Court of Appeals below overruled the District Court's decision to apply a state common law limitations period, it expressly refused to decide whether its decision to apply the Exchange Act limitations period was to be applied "retroactively" in this case. The three dissenting judges, while agreeing with the majority on the borrowing issue, would have reached the retroactivity question, and would have held the Court's decision to apply *prospectively only, i.e.* not in this case. (The Court of Appeals subsequently applied its decision herein retroactively in another case). The retroactivity issue in this case will now have to be decided by the District Court and, whatever it decides, review of its decision will likely be sought in the Court of Appeals. If the decision is applied prospectively only, the second question certified below (regarding which State limitations statute to apply),

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[1]The three judges dissenting below agreed with the majority on the application of federal law, but would have applied the decision prospectively only, and not in this case. The majority did not reach the retroactivity question. See discussion *infra.*

not addressed below, along with tolling and other reserved issues of case-determinative impact, will have to be resolved. This Petition therefore seeks review now of an interlocutory ruling which may ultimately be rendered inapplicable to the parties in this case.

SUMMARY OF ARGUMENT

There Is No Need For The Court To Take Another Limitations "Borrowing" Case In Light Of Its Recent Decisions (Point I Below)

The Court in *Wilson, DelCostello* and *Malley-Duff* has already spelled out in step-by-step detail how courts are to approach limitations "borrowing" questions in cases involving federal implied private actions. This case simply constitutes an application of that prescribed process. This Court need not decide how its approach should be applied with respect to every implied action. Nor does the decision below impact on future cases brought by the SEC.

The Decision Below Does Not Conflict With Applicable Decisions Of This Court (Points II and III Below)

This Court has never held that state limitations law must be borrowed in Section 10(b) cases. It *has* held that *federal* law should be considered as a borrowing source as part of the *Wilson* borrowing analysis, and should be

used in an appropriate context. Further, it has never held that a legislated outside time limit on equitable tolling, such as that found in the Exchange Act provisions borrowed here, must be disregarded by courts in the borrowing process.

There Is No Conflict Among The Circuits On The Same Matter Involved In This Case (Point IV)

The decision below is the first to seriously consider, much less adopt, the federal-law-borrowing option in a Section 10(b) case in light of recent decisions of this Court. Because the other courts of appeal are now only beginning to consider this precise question, there is no "conflict" in the circuits on the "same matter" (Supreme Court Rule 17.1(a)), and no conflict may ever develop. The Court should allow time for the other courts of appeal to consider the question.

This Is Not The Appropriate Case For The Court To Decide The Questions Presented (Point V)

The Court of Appeals reserved on the question whether its decision should apply retroactively in this particular case. The Court should not address the questions presented in a case in which the applicability of its determination to the parties before it is uncertain.

LEGAL ARGUMENT

POINT I

THERE IS NO NEED FOR THE COURT TO TAKE THIS CASE; THE COURT HAS ALREADY SPELLED OUT THE APPROACH TO BE USED IN LIMITATIONS "BORROWING" CASES, AND NEED NOT DECIDE HOW THAT APPROACH APPLIES TO EVERY IMPLIED FEDERAL PRIVATE ACTION

In *Wilson v. Garcia, DelCostello v. Teamsters* and *Agency Holding Corp. v. Malley-Duff & Associates, supra,* this Court carefully considered the subject of the "borrowing" of statutes of limitations in implied federal private civil actions. The Court therein prescribed and refined the approach to be taken by lower courts in such cases. As can be seen from the Petition herein, petitioners do not contend that the Court of Appeals failed to follow the methodology prescribed in *Wilson, DelCostello* and *Malley-Duff*: petitioners only contend that the Court of Appeals reached the wrong result.

Because the Court need not revisit the general issue of limitations borrowing, and are not being asked to by petitioners anyway, there is no "special and important reason" (Rule 17.1(a)) to take this case. Nor is it necessary or even appropriate for this Court to decide how its already well-defined borrowing process should be applied with respect to each and every variety of implied federal private action. This is particularly so where, as here, no other prior precedent of the Court is implicated and where, as here, there has not yet been an opportunity for the other circuits even to consider the precise matter involved.

The lower courts already have the benefit of this Court's guidance in three recent relevant cases. As to some private actions, courts may follow that guidance and borrow limitations provisions from analogous state law. As to others, the borrowing of federal law may be appropriate within the Court's guidelines. Just because the first court of appeals to follow the new guidelines in a Section 10(b) case borrowed from federal law, instead of from state law as had been the prior practice, is insufficient reason for this Court to grant *certiorari*.[2]

POINT II

THE DECISION BELOW DOES NOT CONFLICT WITH DECISIONS OF THIS COURT; THOSE DECISIONS REQUIRE CONSIDERATION OF FEDERAL LAW AS A LIMITATION BORROWING SOURCE, AND THIS COURT HAS NEVER HELD THAT STATE LAW MUST BE BORROWED IN SECTION 10(b) CASES

The first "question presented" by petitioners rests on a faulty premise: decisions of this Court do not "require borrowing a limitations period drawn from state law" in all implied federal actions. In fact, the

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[2]Petitioners' suggestion that the decision below will affect Section 10(b) enforcement actions brought by the Securities and Exchange Commission in the Third Circuit is unfounded. This case is not an SEC action, and the application of the Court of Appeals' decision to SEC cases was not even addressed below. Further, the courts which have addressed the question have held that the SEC is not affected by borrowed statutes of limitation whether seeking injunctive relief or monetary relief, such as "disgorgement" of profits for the benefit of injured investors. *See e.g. SEC v. Glick,* 1980 CCH Fed.Sec. L.Rptr., ¶97,535 (D.Nev. 1980) (injunctive action); *SEC v. Continental Advisors,* 1978 CCH *Id,* ¶96,489 (D.D.C. 1978) (disgorgement, relying on *United States v. Summerlin,* 310 U.S. 414 (1940)).

leading case relied on by petitioners for this contention, *Holmberg v. Armbrecht,* 327 U.S. 392 (1946), is to the contrary. The Court there "made [it] clear" that application of state limitations periods is done "as a matter of interstitial fashioning of remedial details . . . and not because the Rules of Decision Act or the Erie doctrine requires it . . . [A]s Holmberg recognizes, neither Erie nor the Rules of Decision can now be taken as establishing a *mandatory* rule that we apply state law in federal interstices." *DelCostello v. Teamsters, supra,* 462 U.S. at 160 n13 (emphasis by the Court).

Not only is the borrowing of state provisions not required in all implied federal actions, but consideration of federal law as a possible borrowing source *is* required in all cases. The Court in *Malley-Duff, supra,* 97 L.Ed.2d at 128, made it clear that the "inquiry . . . whether a federal or state statute of limitations should be used" is part of the borrowing process mandated by *Wilson v. Garcia.* Thus, in *Malley-Duff,* the Court looked to federal not state law for an analogous limitations provision for an implied federal private action, as it had in *DelCostello,* in *McAllister v. Magnolia Petroleum Co.,* 357 U.S. 221 (1958), and in *Occidental Life Ins. Co. v. EEOC,* 432 U.S. 355 (1977).

Nor was the Court of Appeals' consideration of the federal law borrowing alternative pursuant to *Malley-Duff* precluded by any holding of this Court requiring borrowing of state limitations law in a Section 10(b) context. Petitioners cite only to *Ernst & Ernst v. Hochfelder,* 425 U.S. 185, 210n29 (1976), in which the Court stated:

> **"Since no statute of limitations is provided for civil actions under § 10(b), the law of limitations of the**

> forum State is followed as in other cases of judicially implied remedies. See *Holmberg v. Armbrecht,* 327 U.S. 392, 395, 90 L.Ed. 743, 66 S.Ct. 582, 162 ALR 719 (1946), and cases cited therein. Although it is not always certain which state statute of limitations should be followed, such statutes of limitations usually are longer than the period provided under § 13 [of the Securities Act of 1933, 15 U.S.C. § 77m]. 3 L. Loss, supra, [*Securities Regulation,* Chap. 11C] n 17, at 1773-1774. As to costs see n 30, infra."

See also Herman & MacLean v. Huddleston, 459 U.S. 375, 384n18 (1983) (in which the Court, citing *Ernst & Ernst,* noted that ". . . courts look to the most analogous statute of limitations of the forum State . . ." in Section 10(b) cases). In neither *Ernst & Ernst* nor *Herman & MacLean* was the Court faced with a statute of limitations issue. As the Court of Appeals below correctly concluded, this Court's passing reference in those cases to lower court practice under *Holmberg* and prior to *Malley-Duff* does not constitute a holding requiring the borrowing of State limitations provisions in Section 10(b) cases.

POINT III

THE EXCHANGE ACT LIMITATIONS PERIOD BORROWED BY THE COURT OF APPEALS INCORPORATES WITHIN IT A THREE-YEAR TOLLING PERIOD; NO DECISION OF THIS COURT REQUIRES UNLIMITED TOLLING WHERE CONGRESS HAS PROVIDED OTHERWISE

Petitioners quote certain general statements found in a few of this Court's opinions to suggest that there is some rule that *unlimited* equitable tolling must be read into every federal fraud statute. The Court has never so held, as will be discussed below. However, it should be

noted that the express Exchange Act limitations period borrowed below *does* provide for tolling, *i.e.* the one-year limitations period provided for may be tolled for a period up to three years from the date the transactions occurred.

Petitioners did not argue below that the Exchange Act "one-year/three-year" limitations period could not be borrowed because it contains a built-in tolling cut-off. This fact is not surprising, because this Court has never held that the equitable tolling doctrine requires or even allows unlimited tolling, where Congress has spoken otherwise. The statement quoted by petitioners in *Holmberg v. Armbrecht, supra* at 397, to the effect that tolling is "read into every federal statute of limitation," was made in a case not involving a "dual" limitations statute, such as those in the Exchange Act. Further, as Justice Frankfurter also stated in the *Holmberg* opinion: "If Congress explicitly puts a limit upon the time for enforcing a right which it created, there is an end of the matter. The Congressional statute of limitation is definitive" (at 395).

Thus, assuming *arguendo* that there were some judge-made rule that unlimited tolling is preferred in fraud cases, such rule would have to yield where Congress has determined to limit tolling for a certain class of fraud claims. That is precisely what Congress has done with respect to federal securities fraud claims. There is no question that Congress considered and rejected arguments similar to those raised by petitioners in determining that claims brought under the securities Acts should not be allowed to survive unasserted for an indefinite period. Instead, Congress balanced the reasonable needs of a diligent aggrieved investor for time to discover a fraud,

against the need of the securities marketplace to work with a measure of certainty and repose, free from the lingering danger of claims far removed in time from the transactions involved. For a brief discussion of the Congressional debates concerning the decision to place an outside limit on federal securities fraud claims, see Bloomenthal, *Securities Law Handbook* (1987-1988 Ed.), § 11.09, pp. 502-508. *And see Report of the [ABA] Task Force on Statutes of Limitations for Implied Actions,* 41 Bus. Law. 645 (1986); *Norris v. Wirtz,* 818 F.2d 1329, 1331-1333 (7th Cir.), *cert. denied,* — U.S. —, 108 S.Ct. 329, 98 L.Ed.2d 356 (1987)

As observed by the court in *Norris v. Wirtz, supra,* it would indeed be incongruous, and would clearly frustrate the intent of Congress, to "disqualify" for borrowing purposes an otherwise analogous uniform limitations period prescribed by Congress to govern virtually every express private action in the very statutory act in which the pertinent implied action is found. Similarly, it would be absurd to hold that the one-year "half" of the express limitations provision at issue here may be borrowed, but the three-year "half" is not suitable, because it reflects a Congressional policy determination regarding securities claims which conflicts with some purported unlimited tolling rule used by courts generally in other contexts. The fact remains: no decision of this Court in letter or spirit precludes the borrowing of an otherwise appropriate federal limitation provision simply because it provides for limited rather than unlimited tolling.

POINT IV

THERE IS NO CONFLICT IN THE CIRCUITS ON THE SAME MATTER RAISED IN THE PETITION; THE OTHER CIRCUITS HAVE YET TO CONSIDER THE MATTER, AND CONSENSUS RATHER THAN CONFLICT MAY WELL DEVELOP

Petitioners contend that the decision below is in "conflict" with decisions of the other circuits, because the other circuits all look to state law for borrowing purposes in Section 10(b) cases. However, this is not the type of "true" conflict envisioned by Rule 17.1(a), nor is it with respect to the "same matter" as provided for therein. *See* discussion in Stern, Gressman & Shapiro, *Supreme Court Practice* (1986), § 4.4, p. 197 *et seq.* The decision below simply constitutes the first in which a Court of Appeals seriously considered the federal law borrowing alternative in a Section 10(b) context in light of *Wilson, DelCostello* and *Malley-Duff.*

Indeed, the decision below for the first time presents a way out of the confusion, uncertainty and conflict which has plagued courts and litigants alike on Section 10(b) limitations issues for the last twenty or thirty years. See ABA Task Force Report, *supra.* The decision below may herald a new era of consensus, uniformity and certainty in this area, as the various other courts of appeal have an opportunity to consider the federal alternative, to see how it works in comparison to the old "patch-work" system, and to follow the lead of the unanimous, *in banc* Third Circuit. It is neither necessary nor desirable for this Court to pre-empt that process at its inception. *Supreme Court Practice, supra* at pp. 199-200 and cases cited. Rather, the unfolding of that process will provide the Court

with the benefit of the thinking of other judges and commentators, and with a comparative record with which to evaluate the most appropriate borrowing alternative, should the Court determine to reach the question at a later time.

There is no question but that the decisional landscape is not yet ripe for this Court's intervention. Apart from an occasional passing comment in a few cases, *see e.g. Sentry Corp. v. Harris*, 802 F.2d 229, 231n1 (7th Cir. 1986), *cert. denied*, — U.S. —, 107 S.Ct. 1624, 95 L.Ed.2d 199 (1987), the federal borrowing alternative has so far only been considered in a handful of cases, almost none with any extended discussion. It was considered at greatest length in *Norris v. Wirtz, supra*, where the Seventh Circuit Court of Appeals felt unable to take the step of borrowing the Exchange Act limitations period, although it also felt such alternative vastly preferable and more consistent with the intent of Congress. The *Norris* court, however, did not have the benefit of *Malley-Duff* nor of the opinion below herein, and inexplicably, failed to discuss and consider the impact of *Wilson* or *DelCostello*.

The other pre-*Data Access* decisions in the courts of appeal are even less instructive. In *Davis v. Birr, Wilson & Co., Inc.*, 839 F.2d 1369 (9th Cir. 1988), Judge Aldisert, sitting by designation, who wrote the majority opinion below herein, wrote a concurring opinion urging the federal borrowing alternative in that Section 10(b) case. The majority, however, did not address the question. The court in *Jensen v. Snelling*, 841 F.2d 600, 606 (5th Cir. 1988),

refused to borrow an Exchange Act express limitation provision in a Section 10(b) case without any extended discussion. The court cited *Malley-Duff*, but did not cite or discuss *Wilson* or *DelCostello*. The court in *Friedlander v. Troutman Sanders Lockerman*, 788 F.2d 1500 (11th Cir. 1986) re-evaluated its approach to Section 10(b) limitations borrowing in light of *Wilson*, but did not have the benefit of *Malley-Duff* and did not even consider federal law as a borrowing source.

Only one court of appeals case decided after the decision below refers to the decision. In *Durham v. Business Management Associates*, 847 F.2d 1505, 1508 (11th Cir. 1988), the court cited earlier Eleventh Circuit precedent in approving the borrowing of a state limitations statute, and added a "but see" reference to the *Data Access* decision without further discussion of the federal law alternative. The court did not cite or discuss *Wilson, DelCostello* or *Malley-Duff*, nor even its own important decision in the *Friedlander* case.

This tentative and meager record reveals that the bench and the bar need more time to consider the Court's new approach to borrowing as it applies to Section 10(b) cases. The decision below will doubtless accelerate that process, sensitizing the courts to the need for a fresh look at the question. This Court should let the re-evaluation process go forward at the lower court level, and step in only when, and if, a true and focused conflict develops. That time has not yet come.

POINT V

EVEN IF THE COURT WERE INCLINED TO CONSIDER THE QUESTIONS PRESENTED IN THE PETITION, IT SHOULD NOT DO SO IN THIS CASE, BECAUSE ITS DECISION MAY BE ADJUDGED INAPPLICABLE TO THE PARTIES HEREIN

As noted *supra*, the Court of Appeals did not reach the question of whether its decision should be applied to the parties in this case. The three dissenting judges would not have done so. Later, in *Hill v. Equitable Trust Co.*, — F.2d —, CCH Fed. Sec. L. Rptr., Current, ¶ 93,919 (3d Cir. July 14, 1988), the Court of Appeals applied its *Data Access* decision retroactively. However, it is uncertain whether the District Court, applying this Court's guidelines in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971) in light of the *Hill* decision, will find retroactivity here. If the District Court follows the pre-*Hill* opinion of the three dissenting judges below herein, and holds that the *Data Access* decision should not be applied to the parties here, and is upheld by the Court of Appeals, the questions raised by the Petition will be of no relevance to these parties.

With this case in such a posture, even if the Court were inclined to address the issues raised by the Petition now, it should not grant certiorari in this case. It would be more appropriate for the Court to take a case in which the parties have a definite and certain stake in the outcome.

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CONCLUSION

Based on the foregoing, it is respectfully submitted that the Petition should be denied.

Respectfully submitted,

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-and-

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Attorneys for Respondents
Tolins & Lowenfels and
Roger A. Tolins

JOHN B. LIVELLI,
Of Counsel and
On the Brief

August 4, 1988

APPENDIX

[Cover Page of Prospectus:]

D A S

650,000 Shares

DATA ACCESS SYSTEMS, INC.

Common Stock

On February 13, 1979, the closing bid and asked prices for the Common Stock in the over-the-counter market, as reported by NASDAQ were \$11½ and \$12½, respectively. See "Price Range of Common Stock."

THESE SECURITIES HAVE NOT BEEN APPROVED OR DISAPPROVED BY THE SECURITIES AND EXCHANGE COMMISSION NOR HAS THE COMMISSION PASSED UPON THE ACCURACY OR ADEQUACY OF THIS PROSPECTUS, ANY REPRESENTATION TO THE CONTRARY IS A CRIMINAL OFFENSE.

	Price to Public	Underwriting Discounts and Expenses (1)	Proceeds to the Company (2)
Per Share	\$11.00	\$1.00	\$10.00
Total Minimum	\$7,150,000	\$650,000	\$6,500,000
Total Maximum(3)	\$7,865,000	\$715,000	\$7,150,000

(1) Excludes \$100,000 non-accountable expense allowance payable to the Underwriters' Representative. See "Underwriting."

(2) Before deducting expenses, including legal and accounting fees and printing costs, estimated at \$320,000 (approximately \$.49 per share assuming non-exercise of the Underwriters' overallotment option).

(3) Assuming full exercise of the 30-day option granted by the Company to the Underwriters to purchase, on the same terms, up to an additional 65,000 shares to cover any overallotments. See "Underwriting."

The Common Stock is being offered by the several Underwriters named herein, subject to acceptance by them, approval by counsel and certain other conditions. The Underwriters reserve the right, in their discretion, to reject in whole or in part, any order for the purchase of Common Stock.

D.H. WALLACH, INC.

The date of this Prospectus is February 14, 1979

* * *

[From page 61 of Prospectus:]

In the event the $7,000,000 insurance companies' loan is consummated upon completion of this offering, the Company will pay the sum of $210,000 to D. H. Wallach, Inc. in connection with arranging for and negotiating such loan and for acting as a financial advisor during the life of the loan. No assurances can be given that such loan will be consummated. See "Business—Financing Arrangements."

Frank J. Lockwood, Director of Corporate Finance of D. H. Wallach, Inc., Representative of the Underwriters has been nominated by management for election to the Company's Board of Directors.

LEGAL OPINIONS

Legal matters in connection with the Common Stock offered hereby will be passed upon by Tolins & Lowen-

fels, 540 Madison Avenue, New York, New York 10022, special counsel for the Company and by Blank, Rome, Comisky & McCauley, 4 Penn Center Plaza, Philadelphia, Pennsylvannia and Adler, Greenberg, Hindy & Turner, 150 East 58th Street, New York, New York 10022, counsel for the Underwriters.

EXPERTS

The financial statements and schedules and the information appearing under "Consolidated Statements of Earnings" included in this Prospectus and Registration Statement have been examined by Touche Ross & Co., I, Kahlowsky & Co. and LaFrance, Walker, Jackley & Saville, independent certified public accountants as stated in their reports appearing herein, and are included in reliance upon the reports of such firms and their authority as experts in accounting and auditing.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
HON. STANLEY S. BROTMAN

DATA ACCESS SYSTEMS SECURITIES LITIGATION	) MASTER FILE NO. 81-1923
THIS DOCUMENT RELATES TO: ALL ACTIONS	) STIPULATION OF SETTLEMENT BETWEEN PLAINTIFFS AND DEFENDANT TOUCHE ROSS & CO.

* * *

2. (a) In compromise and full settlement of all claims for relief asserted or which could have been asserted against the Touche releasees by plaintiffs and the Data Access class arising out of or relating to the matters, transactions, and events which are the subject of the Data Access Systems Securities Litigation, Touche shall, upon the execution of this Stipulation by counsel for Touche and lead counsel for plaintiffs and class members, deliver the following sums to the firms of Barrack, Rodos & Bacine, lead counsel for plaintiffs and class members, and Shea & Gould, counsel for Touche (the "Escrow Agents"), to be held in escrow, except as provided in subparagraph "2(b)" hereof, pending final approval of the settlement embodied in this Stipulation: $3,205,000 shall be delivered jointly to Barrack, Rodos & Bacine and Shea & Gould and $45,000 shall be delivered solely to Barrack, Rodos & Bacine. Both funds, including interest earned thereon and less any withdrawals expressly per-

mitted herein, shall be referred to collectively hereinafter as the "Settlement Fund". The Escrow Agents agree to hold the $3,205,000 in escrow pursuant to the terms of this Stipulation and to invest the same, as soon as practicable, at current market rates in certificates of deposit, money market funds, or United States Treasury bills (the "escrow securities"). Up to the date of the hearing on whether this partial settlement should be approved, all such escrow securities shall be due and payable in accordance with their respective terms 13 weeks or less from the date of purchase. Except as provided in subparagraph "2(b)", the Escrow Agents shall reinvest the proceeds of the escrow securities as they mature in similar escrow securities at then current market rates.

* * *

4. Conditioned upon final approval of the settlement as defined in paragraph "3" of this Stipulation, plaintiffs and class members hereby agree as follows:

(a) To deliver any monies recovered from any other defendant in the Data Access Systems Securities Litigation, whether by way of judgment or settlement, into a separate escrow (the "Recovery Fund") to be held by Barrack, Rodos & Bacine, as sole Escrow Agent, and invested in the same manner as herein provided regarding the Settlement Fund; provided, however, that there shall be no payments made out of the Recovery Fund except in accordance with paragraph "6" of this Stipulation.

(b) To idemnify Touche and hold it harmless from any cross-claim, third-party claim, or subsequently asserted claim for contribution or indemnity

made by any other defendant in the Data Access Systems Securities Litigation (i) with respect to any judgment entered against such other defendant in favor of plaintiffs and class members, or any of them, arising out of any of the matters, transactions, or events which are the subject of the Data Access Systems Securities Litigation or (ii) with respect to monies paid by such other defendant (but not including DASI securities issued to plaintiffs and the class members in connection with the DASI reorganization proceedings) to plaintiffs and class members, or any of them, in settlement of the claims asserted by plaintiffs, on behalf of themselves and the class members, against such other defendant with respect to any of the matters, transactions or events which are subject of the Data Access Systems Securities Litigation.

(c) Upon the entry of a judgment for contribution and/or indemnity in favor of any other defendant in the Data Access Systems Securities Litigation against Touche, to pay such other defendant all or part of the Recovery Fund as required to fully satisfy the judgment in favor of such defendant against Touche.

(d) In the event that the judgment referred to in subparagraph "4(c)" is entered at the same time as the judgment of plaintiffs and class members against such other defendant, to reduce the amount of the judgment that they collect against each such other defendant by the amount of any judgment which such other defendant is entitled to collect against

Touche and to obtain and deliver to Touche a general release in favor of the Touche releases from such other defendant.

(e) In the event that any other defendant from whom plaintiffs recover judgment or receive any settlement monies has not asserted a claim for contribution and/or indemnity against Touche in the Data Acess Systems Securities Litigation, to continue to hold that portion of the Recovery Fund representing monies recovered or collected from such other defendant in escrow until (i) the expiration of the applicable statute of limitations[1] governing such a claim for indemnity or contribution by such other defendant or (ii) the adjudication of any claim for contribution or indemnity which is thereafter asserted by such other defendant against Touche prior to the expiration of the applicable statute of limitations, which ever is later, or (iii) the delivery of a release by such other defendant to the Touche releases with respect to all of its claims for contribution and/or indemnity.

(f) In the event a judgment is entered against Touche in favor of any other defendant with respect to a claim for contribution or indemnity not asserted in the Data Access Systems Securities Litigation, but arising out of or relating to the matters, transactions, or events which are the subject of the Data Access Systems Securities Litigation, to pay such other defendant all or part of the Recovery Fund as required

---

[1]As determined by counsel for Touche.

to fully satisfy the judgment in favor of such other defendant against Touche.

(g) In the event plaintiffs and the class members desire to settle the Data Access Systems Securities Litigation with any other defendant, or to settle any claims for relief they may have against a person or entity not presently a defendant in the Data Access Systems Securities Litigation, but arising out of or relating to the matters, transactions or events which are the subject of the Data Access Systems Securities Litigation, to condition such settlement upon the execution and delivery to Touche of a release by such defendant, other person or entity for any claim which such defendant, person or entity has or could have against the Touche releasees.

(h) In the event Touche settles any claim for contribution or indemnity asserted against it by any other defendant in the Data Access Systems Securities Litigation, to pay such other defendant out of the Recovery Fund such sum as Touche is required to pay pursuant to the terms of the settlement.

(i) Until the Recovery Fund, after all payments required by subparagraphs "4(c)", "4(f)", and "4(h)", exceeds $$1,500,000, to not settle the Data Access Securities Litigation with any other defendant without the prior written approval of counsel for Touche.

(j) The obligation of plaintiffs and the class members to indemnify Touche pursuant to this paragraph "4" shall be limited to the sum then held in

the Recovery Fund. No monies recovered or collected from any other defendant shall be distributed out of the Recovery Fund until plaintiffs and the class members have satisfied their obligation to indemnify Touche with respect to contribution or indemnity claims which that defendant has or may have against Touche.

5. Conditioned upon final approval of the settlement as defined in paragraph "3" of this Stipulation, Touche agrees to defend against any claim for contribution or indemnity with respect to which plaintiffs and the class members have agreed to hold Touche harmless. Until the aggregate sum of $4,892,857 is paid out of the Recovery Fund pursuant to paragraph "6" of this Stipulation, Touche shall have the right to determine all decisions with respect to the conduct of such defense, or the settlement of such a claim. Thereafter, Touche shall continue to have the right to determine all decisions with respect to the conduct of its defense, but shall not settle any such contribution or indemnity claims without the prior written approval of lead counsel for plaintiffs and the class members. Touche shall be entitled to defend all such claims for relief with counsel of its own selection and shall pay the fees and expenses of its counsel.

6. Following the adjudication, settlement or expiration of all claims for contribution and/or indemnity that any defendant from whom plaintiffs recover judgment or collect settlement monies has or may have against Touche, that portion of the Recovery Fund representing monies recovered or collected from such defendant, less any amount repaid to such defendant pursuant to subparagraphs

"4(c)", "4(f)", or "4(h)", shall be released from escrow and paid to Touche, plaintiffs and the class members as follows:

(a) Touche shall be paid the first $750,000, or portion thereof, released from the Recovery Fund.

(b) Touche and plaintiffs and the class members shall each be paid fifty percent (50%) of the next $2,000,000, or portion thereof, released from the Recovery Fund.

(c) Touche shall be paid thirty-five percent (35%) and plaintiffs and the class members shall be paid sixty-five percent (65%) of the next $2,142,857, or portion thereof, released from the Recovery Fund.

(d) Plaintiffs and the class members shall be paid all further monies released from the Recovery Fund.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
HONORABLE STANLEY S. BROTMAN
(Filed May 18, 1982)

IN RE: DATA ACCESS SYSTEMS SECURITIES LITIGATION

MASTER FILE NO. 81-1923

MICHAEL VITIELLO,
STANLEY SHERIN,
PAMELA MARTIN,
J.H. LEVIT,
GILES FRANKLIN,
IRWIN KURLANDER,
PETER DONIGER,
ALEXANDRIA A. RICHARDSON,
STEVEN STONE,
ERNEST GREENBERG,
CARMEN PECORARO, and
HJALMAR S. SUNDIN,
RAYMOND FASTEAU,
ERROLL STOLTZ,
MARVIN NOTT,
JOHN INFANTE,

Plaintiffs,

v.

CLASS ACTION

GERALD R. CICCONI,
ROBERT T. COPPOLETTA,
BENEDICT H. PARATORE,
HOWARD B. CRYSTAL,
JAMES T. SIMPSON,
PHILIP HARTLEY,
THOMAS COPPOLETTA,
JOHN J. WILK,
FRANK LOCKWOOD,

PAUL MATZKO,	)	
ROBERT B. FRANKLIN,	)	
MICHAEL J. HAGGERTY,	)	
PETER V. DIGUILIO,	)	JURY TRIAL
ANTHONY J. SIMEI,	)	DEMANDED
MARIO CAPONEGRO,	)	
GERALD LAVINE,	)	
DOUGLAS KREINER,	)	
CLARENCE REED,	)	
MICHAEL EVANGELISTA,	)	
JOHN GAULT,	)	
RUSSELL HETTINGER,	)	
SAMAY INDUSTRIES, INC.,	)	
E-O DATA CORP.,	)	
CAMBRIA CORP.,	)	
J&J PROPERTIES,	)	
GAULT ASSOCIATES, INC.,	)	
TRANSNET CORP.,	)	
D&R CONTRACTORS,	)	
JOHNSON-FERNE CORP.,	)	
MARK SERV CO.,	)	
TOUCHE ROSS & CO., and	)	
D. H. WALLACH, INC.,	)	
DATA ACCESS SYSTEMS, INC.,	)	
	)	
Defendants.	)	
	)	

SECOND CONSOLIDATED AMENDED CLASS ACTION COMPLAINT

(Filed May 18, 1982)

Plaintiffs, for their Second Consolidated Amended Class Action Complaint ("Complaint") against the defendants, allege:

JURISDICTION AND VENUE

* * *

17. Defendant Touche Ross & Co. ("Touche Ross") was and is a firm of certified public accountants, with a place of business in the District of New Jersey. Touche was the auditor for defendant DAC during the times of the wrongs alleged herein, provided various accounting services, and rendered unqualified opinions with respect to various financial statements of DAC, including the statements appearing in DAC's annual reports for the fiscal years ending August 31, 1978, 1979 and 1980.

18. Defendant D.H. Wallach, Inc. has a principal place of business located at 1700 Market Street, Suite 3222, Philadelphia, Pennsylvania and does business in New Jersey. Said defendant was the managing underwriter of the February 14, 1979 public offering by DAC of 710,000 shares of common stock preferred to in Count II herein.

19. Various other persons, firms, corporations, agents and attorneys not named or made defendants herein have participated as co-conspirators in offenses charged in this Complaint and have performed acts and made statements in furtherance thereof. Such persons, firms, corporations, agents and attorneys did also know of and substantially assisted in effectuating the unlawful scheme of offenses charged in this Complaint and did thereby aid and abet therein.

CLASS ACTION ALLEGATIONS

* * *

③

No. 88-54

In The

Supreme Court of the United States

October Term, 1988

MICHAEL VITIELLO,
on behalf of himself and the certified class of
DATA ACCESS SYSTEMS, INC., shareholders,

Petitioner,

v.

I. KAHLOWSKY & CO., PETER CUNICELLI,
TOLINS & LOWENFELS, and
ROGER A. TOLINS,

Respondents.

BRIEF OF RESPONDENTS I. KAHLOWSKY & CO. AND PETER CUNICELLI IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

FRANCIS P. DEVINE, III
(Counsel of Record)
MARK S. GUREVITZ
WHITE AND WILLIAMS
16th Floor
1234 Market Street
Philadelphia, PA 19107
(215) 854-7000

Attorneys for Respondents
I. Kahlowsky & Co. and
Peter Cunicelli

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

QUESTIONS PRESENTED

1. Whether, consistent with the approach outlined by the Court in *DelCostello, Wilson* and *Agency Holding,* the statute of limitations enacted by Congress for express rights of action under the securities acts, rather than an inexact patchwork of state laws, provides a more appropriate source for borrowing the most analogous statute of limitations applicable to claims under § 10(b) of the Securities Exchange Act of 1934?

2. Should not the borrowed statute, selected because it best reflects Congressional intent and federal securities policy, be applied in the manner that Congress intended—as absolute and not subject to tolling?

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TABLE OF AUTHORITIES

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STATEMENT OF THE CASE

This case involves application by the Court of Appeals of the principles announced in *DelCostello v. Teamsters, Wilson v. Garcia* and *Agency Holding Corp. v. Malley-Duff & Associates, Inc.* The Third Circuit Court of Appeals unanimously held that, in light of Congressional philosophy and purposes set forth in the Securities Act of 1933 and the Securities Exchange Act of 1934, the express limitations periods under the 1934 Act provides the proper source of limitations borrowing for violations of § 10(b) and Rule 10b-5 securities claims. *In Re: Data Access Systems Securities Litigation,* 843 F.2d 1537 (3d Cir. 1988) (*in banc*).

The issue arose in a securities class action suit brought by purchasers of Data Access Systems, Inc. ("DASI") common stock between October 31, 1978 and June 22, 1981. The first shareholder complaint was filed on June 23, 1981. Other complaints followed. First and Second Consolidated Amended Class Action Complaints were filed on October 26, 1981 and May 18, 1982 respectively. The allegations in the First Class Action Complaint pertain to the 1979 DASI offering prospectus, which was alleged to be false and misleading. The Second Class Action Complaint was filed to incorporate additional claims in the wake of a March 1982 report issued by a special agent appointed by the district court in connection with a related SEC enforcement action against DASI.

I. Kahlowsky & Co. and Peter Cunicelli ("Kahlowsky and Cunicelli"), respondents here, were not named in the initial complaints or the First or Second Amended Class

Action Complaints. Kahlowsky and Cunicelli were not named as parties to any DASI-related litigation until a Third Amended Complaint was filed on January 7, 1986—more than six years after the prospectus was issued and more than four years after the special agent issued his report. The Third Amended Complaint alleges, at ¶15, that Kahlowsky and Cunicelli conspired to defraud the DASI shareholders by providing false and incomplete information to DASI's auditors, Touche Ross, concerning the nature of transactions between DASI and Mark Serv, Met-Fab Corporation and Bubble Systems (Pet. App. 7ba).

While Petitioners contend that they did not "discover" the facts giving rise to the claims against Kahlowsky and Cunicelli until sometime in 1985, when they happened to see a copy of a deposition of Cunicelli taken in 1984 by Touche Ross in a related DASI proceeding, they knew or should have known the facts on which these allegations are based long before that. Kahlowsky and Cunicelli were identified as auditors of the DASI-related companies in the 1979 prospectus. Moreover, the special agent's report identifies Kahlowsky as the accountants for Mark Serv Corp., Mark Serv Co., Met-Fab and Bubble, and identifies Cunicelli as the principal of the Kahlowsky firm. The present claims are based on the very same transactions and nucleus of facts described by the special agent, though the special agent ascribed no wrongdoing to Kahlowsky or Cunicelli. The Second Amended Complaint, filed as a result of this report, alleged that "other persons . . . not named or made defendants herein have participated as co-conspirators in offenses charged in this Complaint and

have performed acts and made statements in furtherance thereof" (Resp. Tolins App. 13). In addition, the fact and substance of communications between Kahlowsky and Cunicelli are documented in the workpapers of Touche Ross, also a defendant, which were apparently made available to petitioners early in the litigation.

Nonetheless, it was not until June 1984 that the deposition of Cunicelli was taken. Even then this deposition was noticed by Touche Ross in a related proceeding and not the petitioners. The alleged inculpatory statements, which were identified by petitioners in responses to discovery, are virtually the same in scope and substance to statements made by Cunicelli in an SEC proceedings involving DASI on March 23, 1981. The inescapable conclusion that petitioners discovered or should have discovered the claims against Kahlowsky and Cunicelli long before 1985, and that the delay in bringing suit was deliberate, is further supported by the fact that permission to file the Third Amended Complaint was not sought until immediately after a partial settlement was reached between petitioners and Touche Ross.

After the complaint was filed in the district court, Kahlowsky and Cunicelli immediately moved to dismiss on the ground that the claims were barred by the two year limitations provision of the New Jersey blue sky law. The motion asserted that this was the applicable statute in light of then-existing Third Circuit precedent and, also, under the newly announced approach of this Court in *Wilson v. Garcia*, 471 U.S. 261 (1985). The district court denied the motion but certified the issue for immediate interlocutory review.

The Third Circuit Court of Appeals accepted the case for review. Kahlowsky and Cunicelli argued in their appeal brief that the court should adopt a uniform federal statute of limitations derived from the limitations periods for express actions under the securities laws in light of this Court's decision in *Agency Holding Corp. v. Malley-Duff & Associates, Inc.*, — U.S. —, 107 S. Ct. 2759 (1987), which had just been announced. In the Court of Appeals, petitioners never argued that the federal statute should not be borrowed because it is not subject to equitable tolling. The *in banc* court unanimously adopted a uniform statute borrowed from federal law but remanded the case to the district court to decide whether the ruling should apply to the parties in this case. Three judges, while agreeing on the uniform statute adopted, did reach the retroactivity issue and dissented on the ground that the rule should be applied prospectively only. Before the remand issued, petitioners were granted a stay of the mandate to file the petition now before the Court.

SUMMARY OF ARGUMENT

Review by this Court is unwarranted because recent opinions in *DelCostello*, *Wilson* and *Agency Holding* have set forth in detail the guidelines and rationale of the Court's new approach to borrowing a statute of limitations where none is provided by Congress. No need exists for the Court to reaffirm the Court of Appeals' proper application of these principles here.

Review is also unnecessary because the decision does not conflict with any decision of this Court or another appeals court. Petitioners' assertion that decisions of this Court mandate resort to state, not federal, law has already been considered by the Court and rejected. In addition, the Court of Appeals reading of the borrowed "one year, three year" statute as absolute does not conflict with decisions of the Court on equitable tolling. No decision of the Court has ever required the application of equitable tolling where, as in the case of the securities laws, Congress has expressed a clear intent that the time for discovery and bringing a claim be limited to three years and no more. The appeals court reading of the statute is consistent with decisions of this Court holding that the intent of Congress is determinative of whether unlimited tolling will apply.

Finally, this case is not an appropriate one to review these issues in any event because: (1) the applicability of the ruling of the parties is uncertain, (2) petitioners did not raise the tolling issue in the Court of Appeals and the issue is not preserved for review, and (3) petitioners' § 10(b) claim is barred under the "one year discovery prong" of the borrowed statute, thereby precluding the necessity to review the tolling question presented here.

ARGUMENT WHY THE PETITION SHOULD BE DENIED

I. THE PROPRIETY OF RESORT TO FEDERAL LAW IN IMPLEMENTING THE BORROWING APPROACH ANNOUNCED IN WILSON V. GARCIA HAS BEEN PREVIOUSLY CONSIDERED AND APPROVED BY THE COURT IN AGENCY HOLDING; THE COURT NEED NOT REAFFIRM EVERY PROPER APPLICATION OF THESE PRINCIPLES.

Petitioners do not quarrel with the Court of Appeals' conclusion that *Wilson v. Garcia,* 471 U.S. 261 (1985), requires that a uniform limitations period be adopted for implied rights of action under § 10(b). Rather, petitioners contend that review by this Court is necessary because Supreme Court precedent requires borrowing of a *state* limitations period. Petition at 13. The Court has already considered this question and held in *Agency Holding Corp. v. Malley-Duff & Associates, Inc.,* — U.S. —, 107 S.Ct. 2759 (1987), that the Rules of Decision Act, 28 U.S.C. § 1652 requires application of state statutes of limitations *unless* federal law provides a closer, more appropriate analogy. The appeals court decision, the first to address the question after *Agency Holding,* is in complete accord with the holdings of this Court. Moreover, no "conflict" among the circuits exists; all of the "contrary" decisions cited by petitioners were decided prior to the Court's pronouncement in *Agency Holding.* Therefore, review by this Court is unnecessary.

In *Wilson v. Garcia,* the Court announced a new approach to "borrowing" the appropriate limitations period for federal statutes where none is provided. The Court

found that federal interests outweigh deference to state statutes of repose where resort to state statutes breeds uncertainty, unnecessary litigation and inconsistent results contrary to the substantive federal policies at stake and held that uniform characterization of all 42 U.S.C. § 1983 claims arising within a given state best serves federal policy and Congressional intent.

Thereafter, in *Agency Holding Corp. v. Malley-Duff & Associates, Inc.*, the Court applied *Wilson* to the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1964 ("RICO") and held that it is a federal statute that offers the closest analogy to civil RICO. In so doing, the Court emphasized that "when a rule from elsewhere in federal law clearly provides a closer analogy than available state statutes, and when the federal policies at stake and the practicalities of litigation make that rule a significantly more appropriate vehicle for interstitial lawmaking, we have not hesitated to turn away from state law." *Agency Holding,* 107 S.Ct. at 2763, quoting *DelCostello v. Teamsters,* 462 U.S. 151, 171-172 (1983). The Court held that "the similarities in purpose and structure between RICO and the Clayton Act" together with "the clear legislative intent to pattern RICO's civil enforcement provision on the Clayton Act strongly counsels in favor of application of the 4-year statute of limitations used for Clayton Act claims." *Agency Holding,* 107 S.Ct. at 2765. The Court also held that the practicalities of RICO litigation provide equally compelling reasons for the desirability of a uniform federal statute because of the "multistate nature" of RICO. 107 S.Ct. at 2766.

The Court of Appeals' adoption of a federal statute of limitations drawn from elsewhere in the securities acts

for all § 10(b) securities cases is an obviously consistent application of *Wilson* in accord with what the Third Circuit viewed as a "strong signal" from this Court in *Agency Holding*. As with RICO, § 10(b) claims have been analogized to a variety of state statutes of limitation, resulting in time-consuming litigation and creating disparities between buyers and sellers and between investors in different states such as were never intended by Congress. As with RICO, state law provides an inexact and unsatisfactory vehicle for enforcement of federal law. The nationwide implications of the securities laws demand national uniformity. As with RICO, federal law provides a "closer analogy" and "more appropriate vehicle for interstitial lawmaking". *See Agency Holding,* 107 S.Ct. at 2763. Judge Easterbrook, in *Norris v. Wirtz,* 818 F.2d 1329 (7th Cir.), *cert. denied,* — U.S. —, 108 S.Ct. 329 (1987), aptly stated:

> As practitioners and scholars agree that the result is a mess, they also believe that the courts missed a turn. Courts should have drawn the periods of limitations for the implied rights from the periods of limitations for the express rights. Congress has not been silent about limitations for securities laws in general, the usual problem that leads federal courts to turn to state law; it has been silent only with respect to rights of action it did not create. Whenever it created a federal right to sue, it also created a statute of repose no longer than three years. That is what the courts should have used. 818 F.2d at 1333.

See also, L. Loss, Fundamentals of Securities Regulation, 1168-69 (1983) ("Would it not be eminently more consistent with the overall statutory scheme to look to what Congress itself did when it was thinking specifically of

private actions in securities cases than to a grab-bag of more or less analogous state statutes?").

The Supreme Court has now, in *Agency Holding,* "opened the door to borrowing federal limitations statutes". *In Re: Data Access Systems Securities Litigation,* 843 F.2d 1537, 1549 (3d Cir. 1988) (*in banc*). The Court of Appeals has applied the principles of *Wilson v. Garcia* and *DelCostello v. Teamsters* to implied rights of action under § 10(b) of the Securities Exchange Act in exactly the same manner as this Court did in *Agency Holding* for RICO. Recent decisions of this Court have amply defined this new approach, and the reasons for it, and there is no need for the Court to reaffirm the proper application of these principles by the Court of Appeals here.

II. UNLIMITED TOLLING IS CONTRARY TO THE EXPRESS INTENT OF CONGRESS TO EXTINGUISH LIABILITY UNDER THE SECURITIES ACT AFTER THREE YEARS; THE BORROWED STATUTE SHOULD BE APPLIED AS CONGRESS INTENDED.

The equitable tolling doctrine has no application where, as in the case of the securities laws, Congress has addressed the tolling issue in the statute itself and expressed an intent in the legislative history to limit the time for discovery of claims as part of the overall enforcement scheme.

This Court has said that the question of whether a statute of limitations is to be tolled is determined by whether the legislature intended that the right be enforceable after the time prescribed. *Burnett v. New York Central R. Co.,* 380 U.S. 424, 426 (1965); *Midstate Horticultural Co. v. Pennsylvania R. Co.,* 320 U.S. 356, 360 (1943).

Just last session, the Court stated that while it is proper to consider policy considerations in construing the securities laws, the "broad remedial goals of the Securities Act are insufficient justification for interpreting a specific provision more broadly than its language and the statutory scheme reasonably permit." *Pinter v. Dahl,* — U.S. —, 108 S.Ct. 2063, 2082 (1988), citing *Touche Ross & Co. v. Redington,* 442 U.S. 560, 578 (1979). The Court of Appeals' reading of the borrowed statute as mandating an absolute three year limit for discovering and bringing securities claims is consistent with the precedent of the Court.

No decision of this Court requires or has held that unlimited equitable tolling must be read into a statute where Congress has stated an intent to the contrary. The cases cited by petitioners in which the Court applied equitable tolling involve instances where Congress was presumably silent on the issue and, unlike the case here, there is no evidence that Congress intended the statute to be absolute. *See, e.g., Explorations Co. v. United States,* 247 U.S. 435 (1918). In no case cited by petitioners or uncovered in respondent's research where the doctrine of equitable tolling was applied did the Court have before it a statute containing its own "built-in" tolling provision as found in the securities acts.

The intent of Congress to limit the time for discovery of claims is nowhere more evident than in the language and legislative history of the securities acts. The plain language of the borrowed "one year, three year" limitations period for express rights of actions under the securities statute supports the conclusion that Congress intended the outside three year period to be absolute. One district

court interpreting an analoguous statute which also contains a "built-in tolling provision" (Interstate Land Sales Full Disclosure Act, 15 U.S.C. § 1711) has persuasively stated:

> "Where the statute expressly provides for a tolling period for fraudulent concealment, and then includes a secondary date which 'in no event' can be surmounted, there is good basis for the belief that the latter date was intended as an absolute barrier to the filing of suits."

Timmreck v. Munn, 433 F.Supp. 396, 408 (N.D. Ill. 1977), quoted in *Aldrich v. McCulloch Properties, Inc.,* 627 F.2d 1036, 1043 (10th Cir. 1980). A similar reading of the securities laws is also consistent with the long-standing doctrine of statutory construction to give effect to every word used by Congress in a statute. *Reiter v. Sonotone Corp.,* 442 U.S. 330, 339 (1979). To accept petitioners' position, any claim brought within one year of the date of discovery would be timely, and the language "in no event more than three years from the date of the violation" would be rendered superfluous. The use of the words "in no event" further supports the conclusion that Congress did not intend for claims to be brought for any reason after expiration of the three year period. *See A.J. Phillips Co. v. Grand Trunk Western Railway Co.,* 236 U.S. 662, 667 (1915) (language of Commerce Act that claims be brought "within two years *and not after* (emphasis added)" indicates that purpose of statute is to prevent suits on delayed claims); *Finn v. United States,* 123 U.S. 227 (1887) (similar conclusion where statute stated that claims not brought within specified period were "forever barred").

The legislative history of the 1934 Act provides clear expressions that Congress did not intend equitable tolling to be read into the prescribed limitations periods. During an extensive Senate debate, the participants agreed that the outside limitations period was to be absolute:

> If [a plaintiff] has been injured and finds that he has been injured, he ought to bring his action within a reasonable time, and we fix that time at 1 year. *If he has not discovered it,* the person who made the misrepresentation or false statement ought to feel safe at some reasonable time that he will not be disturbed.

78 Cong. Rec. 8198 (emphasis added) (remarks of Senator Fletcher). The Senate Bill as reported out of Committee originally set the outside time period at six years, about which Senator Barkley commented: "In this bill as it is written we give a man six years in which to discover whether or not a fraud has been committed on him. After that six-year period he cannot bring suit." 78 Cong. Rec. at 8198. This was subsequently reduced to three years. Congress was concerned that a longer statute might "deter men from serving on boards of directors". *Id.* at 8200. Concerns about the disruptive effects that long statutes of limitations would have on the business community also prompted Congress to amend the 1933 Act limitations statute, 15 U.S.C. § 77m, from a "two year from date of discovery, but in no event more than ten years after the sale" to a "one year, three year" statute similar to those enacted for the express rights of action in the 1934 Act. As stated in a recent ABA Task Force Report, the conclusion is "inescapable . . . that Congress did not intend equitable tolling to apply in actions under the securities laws."

Report of the Task Force on Statutes of Limitations for Implied Actions, 41 Bus. Law. 645, 655 (1986). *See also* 6 J.S. Ellenberger & Ellen P. Mahar, Legislative History of the Securities Act of 1933 and Securities Exchange Act of 1934, 6565-66, 6718, 6993 (1973).

In view of the fact that the limitations period for express rights of action under the securities act is the most appropriate source of determining what Congress would have intended with respect to an implied action under §10(b), and the very reason to borrow that statute in the first place, it makes little sense to then incorporate equitable tolling when applying that statute to § 10(b). Such a result would not only be directly contrary to the clear intent of Congress, but would render the entire borrowing process a useless exercise. The fact that Congress affirmatively rejected the concept of equitable tolling for all express rights of action under the securities law, even those involving fraud, *see, e.g.,* 15 U.S.C. § 77m (governing the timeliness of § 12(2) claims), is clear evidence that Congress intended such a doctrine to apply to the implied § 10(b) right of action. As this Court has observed in *Board of Regents v. Tomanio,* 446 U.S. 478 (1980), where it held that the "borrowing" of state limitations law includes rules of tolling, "[a]ny period of limitation . . . is understood fully only in the context of the various circumstances that suspend it from running. . . ." 446 U.S. at 486, quoting *Johnson v. Railway Express Agency, Inc.,* 421 U.S. 454, 463-464 (1975). That concept has even greater applicability when the statute is "borrowed" from the very same legislative scheme enacted by Congress.

III. REVIEW OF THESE ISSUES IN THIS CASE IS INAPPROPRIATE BECAUSE (1) THE DECISION MAY NOT APPLY TO THE PARTIES, (2) PETITITIONERS NEVER RAISED OR PRESERVED THE EQUITABLE TOLLING ISSUE BELOW, AND (3) PETITIONERS SECURITIES CLAIMS ARE BARRED BY THE ONE YEAR PRONG OF THE BORROWED STATUTE THUS PRECLUDING THE NEED TO REACH THE TOLLING QUESTION RAISED HERE.

This case is not an appropriate one in which to review the questions presented in any event. First, because the issue arose in the form of an interlocutory appeal and the district court did not address the issue, the Court of Appeals did not reach the question of whether its decision should be applied to the parties in this case. While a subsequent Third Circuit panel decision applied the *Data Access* decision retroactively in another case, *Hill v. Equitable Trust Co.,* 851 F.2d 691 (3d Cir. 1988), the three dissenting judges below would not accord the benefit of the decision to the parties here. Thus, whether the parties have a definite stake in the outcome of the questions presented remains uncertain. Second, even though respondents argued for the national federal statute adopted by the Court of Appeals, after *Agency Holding* was decided by this Court, petitioners never argued that the "one year, three year rule" should not be borrowed because it contains a built-in tolling cut off. Thus, the tolling issue was never an issue in contention below, petitioners have not preserved the question for review and it would be inappropriate to consider the issue now. Finally, petitioners have no stake in the tolling question raised here because petitioners' claims are barred under the one year discovery

prong of the borrowed statute regardless of whether the three year period is tolled. Petitioners discovered or should have discovered the claims alleged against Kahlowsky and Cunicelli more than one year before the Third Amended Complaint was filed on January 7, 1986.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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(4)

No. 88-54

In the Supreme Court of the United States

OCTOBER TERM, 1988

MICHAEL VITIELLO,
on behalf of himself and the
certified class of Data Access Systems, Inc.
shareholders, PETITIONER

v.

I. KAHLOWSKY & CO.,
PETER CUNICELLI,
TOLINS & LOWENFELS, and
ROGER A. TOLINS

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Respondents argue that review is unwarranted because the decision below does not contravene this Court's precedents and creates no conflicts among the circuits. Respondents are wrong. This Court's precedents require application of a state limitations period to §10(b) actions. The Court's precedents, in fact, are so clear that until the decision below the courts of appeals unanimously so held. (Petition at 19-20). Similarly, this Court has always required tolling in cases of fraud, and its holdings on the point are so unequivocal that no court of appeals has ever held to the contrary. The *en banc*

decision of the court of appeals in this case thus fails to adhere to this Court's precedents on both the borrowing and the tolling issues, and creates an irreparable conflict with all the other courts of appeals on both questions presented in the petition.

Far from an unexceptional application of this Court's precedents in an area of minor importance, the decision below misapplies this court's precedents to securities fraud class actions *and* SEC injunction actions under §10(b) of the Securities Exchange Act. The court of appeals recognized (App. A, p.20) that "we must proceed on the assumption that Congress intends to borrow state law; we must borrow a state statute" — and then applied a *federal* limitations period to all §10(b) civil actions. The decision thus rejected this Court's rule that "[w]hen Congress has not established a time limitation for a federal cause of action, the settled practice has been to adopt a local time limitation as federal law" (*Wilson v. Garcia*, 471 U.S. 261, 266 (1985)), and failed to follow the teachings of this Court that "resort to state law remains the norm for borrowing of limitations periods." *DelCostello v. Internat'l Brotherhood of Teamsters*, 462 U.S. 151, 171 (1983).

Respondents' statement that "*Congress* has determined to limit tolling with respect to federal securities law claims" under §10(b) (Tolins & Lowenfels Br. 13) inverts reality: as this Court has recognized, "no statute of limitations is provided for civil actions under §10(b)" because the right of action thereunder was not created by Congress but by the courts. *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 210 n.29 (1976). See *Herman & MacLean v. Huddleston*, 459 U.S. 375, 380 & n.10 (1983). Moreover, since the decision below imposes an untollable one-year limitations period on all §10(b) fraud

actions, respondents' suggestion that the new one-year limitations period may be "tolled" for up to three years is flatly wrong.[1]

1. Respondents argue (Tolins & Lowenfels Br. 10-12) that this Court has never required application of a state limitations period to §10(b) actions. They are wrong. The precedents of this Court require application of a limitations period drawn from state law when none is supplied by federal law, and §10(b) actions are no exception. As the Court explained in *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 210 n.29 (1976): "[s]ince no statute of limitations is provided for civil actions under §10(b) [of the Securities Exchange Act], *the law of limitations of the forum state is followed* as in other cases of judicially implied remedies." (emphasis added). More recently, the Court reiterated the rule that in §10(b) cases, "*courts look to the most analogous statute of limitations of the forum state.*" (emphasis added). *Herman & MacLean v. Huddleston*, 459 U.S. 375, 384 n.18 (1983).

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1. Although not relevant to the issues presented in the petition, we briefly address respondents' mischaracterization of petitioner's prosecution of this action in the district court. (Tolins & Lowenfels Br. 2-4). Respondents correctly note that petitioner refrained from suing them until the district court granted his motion for leave to amend in January 1986. In a classic case of concealed fraud, until the motion was filed in September 1985 petitioner lacked sufficient evidence of respondents' culpability to name them as defendants in a securities fraud suit. That evidence was uncovered in 1985 when, in separate litigation between DASI's auditors and bank creditors, petitioner obtained access to respondents' previously confidential deposition transcripts. Respondents' erroneous belief (Tolins & Lowenfels Br. 3) that petitioner could have conducted his discovery long before 1985 ignores the stay of all merits discovery that was in effect until after the district court's decision on class certification in the fall of 1984.

Respondents' implication that petitioner has not zealously conducted this litigation on behalf of the class he represents is unfounded. The lawsuit was vigorously pursued from its inception.

Nothing in *Wilson*, *DelCostello*, or *Agency Holding Corp. v. Malley-Duff & Associates*, No. 86-497 (June 22, 1987), changed this rule for §10(b) actions. Indeed, none of these decisions mentioned or qualified the rule in any way in the context of §10(b) litigation. To the contrary, all three decisions stress what *Hochfelder* and *Huddleston* made crystal-clear: district courts must follow the "longstanding practice of borrowing state law" for §10(b) limitations periods. (*Agency Holding*, Slip Op. 4). See *DelCostello*, 462 U.S. at 171 ("the norm"); *Wilson*, 471 U.S. at 266 ("settled practice"). The decision of the court below is flatly in derogation of the precedents of this Court. Review is warranted to correct the court of appeals' failure to adhere to this Court's precedents requiring borrowing state limitations periods for §10(b) actions.[2]

2. Contrary to respondents' belief (Tolins & Lowenfels Br. at 12), the decisions of this Court have for over a century expressed abhorrence of the concept that the perpetrator of a fraud can escape all civil liability for his conduct by simply concealing his wrongdoing until the statute of limitations has run. The Court has consistently and without deviation held that tolling is read into every limitations period governing claims that sound in fraud, to the end that "no man may take advantage of his

2. In *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355 (1977), the Court declined to apply state limitations periods to EEOC enforcement actions to avoid the "direct conflict" that would otherwise occur between state statutes of limitations and "*the decision of Congress to delay judicial action* while the EEOC performs its administrative responsibilities." 432 U.S. at 368, 369 (emphasis added). Congress, of course, has never legislated a "delay of judicial action" for §10(b) cases, and there is accordingly no possibility that in the context of civil §10(b) litigation, "the importation of state law will frustrate or interfere with the implementation of national policies." *Id.* at 367. See *McAllister v. Magnolia Petroleum Co.*, 357 U.S. 221, 225-26 (1958) (same).

own wrong." *Glus v. Brooklyn Eastern District Terminal*, 359 U.S. 231, 232 (1959).[3]

The Third Circuit has now retroactively applied its new limitations period to a §10(b) case that was filed before the opinion below was issued. *Hill v. Equitable Trust Co.*, 851 F.2d 691 (3rd Cir. 1988). In so doing, the court of appeals has confirmed that it meant to eliminate tolling in §10(b) actions: "We concluded in *Data Access* that the appropriate period of limitations for section 10(b) and Rule 10b-5 cases was one year after discovery, with a maximum outside limit of three years from date of purchase." 851 F.2d at 698. The decision below, and the Third Circuit's decision in *Hill* to apply its untollable three-year limitations period to a §10(b) case filed before announcement of the new statute of limitations, have generated a flood of dismissal motions in securities fraud class actions throughout the country.[4]

3. Respondents erroneously assert that the decision below exempts SEC enforcement actions from its scope. (Tolins & Lowenfels Br. 10 n.2). But this Court has held that where, as here, a statute of limitations provides that "*any* civil action is time-barred unless filed within [a specified number of] years after the date it accrued," and

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3. Contrary to respondents' assertion here, petitioner argued before the court of appeals that the "one-year/three-year" limitations period contained in Sections 9(e), 18(c), and 29(b) of the Securities Exchange Act cannot be applied to §10(b) fraud cases because it contains (in respondents' words) a "built-in tolling cut-off." (Tolins & Lowenfels Br. 13).

4. *E.g.*, *In re Western Union Securities Litigation*, Master File No. 84-5092 (D.N.J.) (motion for dismissal on statute of limitations grounds); *In re AIA Industries Securities Litigation*, Master File No. 84-2276 (E.D. Pa.) (same); *In re Convergent Technologies Securities Litigation*, Master File No. C-84-20749(A) SW (N.D. Cal.) (same); *Grossman v. Texas Commerce Bancshares, Inc.*, 87 Civ. 6295 MJL (S.D.N.Y.) (same); *Bernstein v. Crazy Eddie, Inc.*, 87 Civ. 0033 EHN (E.D.N.Y.) (same); *Robin v. Doctors Officecenters Corp.*, 84 C 10798 (N.D. Ill.) (same); *Heideman v. Toreson*, Civil Action No. C-86-20024-SW (N.D. Cal.) (motion for leave to amend to add statute of limitations defense).

the "language makes no exception for civil actions by [the United] States," the government is "not entitled to an exemption from the strictures of" the limitations period. *Block v. North Dakota*, 461 U.S. 273, 287-88 (1983) (emphasis in original). The decision below clearly applies to all civil §10(b) actions, including those brought by the Securities and Exchange Commission.[5]

4. Respondents assert that the decision of the court of appeals has created no conflict among the circuits on the borrowing or tolling issues, and that this Court should therefore let the Third Circuit's resolution of the questions stand until all the lower courts have ruled. (Tolins & Lowenfels Br. 15-17). But all the courts of appeals *have* ruled, and they have ruled exactly the opposite to the holdings of the decision below. Petition at 19-20, 23-24. The conflict among the circuits is thus both complete and, since the decision below was rendered *en banc*, irreparable.

Every court of appeals that has considered the question after *Wilson*, *DelCostello*, and *Agency Holding* has explicitly rejected application of a federal limitations period to a cause of action arising under §10(b) and has applied the equitable tolling doctrine to the applicable

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5. Delay by the SEC in mounting its enforcement actions is inevitable. "In many instances proceedings for enforcement of the Securities Laws are begun *more than five years* after some of the alleged violative transactions have taken place. . . . Complaints are often made to the [Securities and Exchange] Commission, or alleged violations brought to its attention, long after the transactions involved have been consummated. The serious nature of an order of the Commission, for even a private hearing to determine whether there have been violations of the Securities Acts, ordinarily necessitates a long preliminary investigation by the Commission's staff and the preparation of a written report to the Commission by the investigating officer. . . . A lapse of more than five years from the date of the alleged violative transactions to the date of the formal order of the Commission is not extraordinary." Martenet, "Statutes Of Limitations On SEC Enforcement Proceedings," 41 Va. L. Rev. 59, 61 (1955) (emphasis added).

state limitations period. See *Durham v. Business Management Associates*, 847 F.2d 1505, 1508 (11th Cir. 1988) (specifically rejecting the borrowing and tolling holdings of the decision below); *Jensen v. Snellings*, 841 F.2d 600, 606-07 (5th Cir. 1988) (specifically rejecting the proposition embraced by the court below (App. A, pp. 22a & 32a) that §29 of the Securities Exchange Act "most closely resembles §10(b) and Rule 10b-5," and applying equitable tolling to the local limitations period); *Davis v. Birr, Wilson & Co., Inc.*, 839 F.2d 1369, 1369-70 (9th Cir. 1988) (rejecting the identical borrowing and tolling rules set forth in the opinion below).[6] Even before the opinion below was issued, at least *five* courts of appeals had specifically rejected application of federal limitations periods to §10(b) actions. *McNeal v. Paine, Webber, Jackson & Curtis, Inc.*, 598 F.2d 888, 891-92 & n.6 (5th Cir. 1979) (rejecting application of §29(b) of the Securities Exchange Act); *Nickels v. Koehler Management Corp.*, 541 F.2d 611, 614 (6th Cir. 1976) (rejecting "a uniform statute of limitations of one year from discovery, up to a maximum of three years" drawn from Sections 9(e), 18(c), and 29(b) of the Securities Exchange Act); *United California Bank v. Salik*, 481 F.2d 1012, 1014 (9th Cir. 1973) ("federal courts have consistently rejected attempts to apply to §10(b) other statutes of limitation found in the [Securities Exchange] Act and in the Securities Act of 1933"); *Jordan Building Corp. v. Doyle, O'Connor & Co.*, 401 F.2d 47, 51 (7th Cir. 1968) (same); *Janigan v. Taylor*, 344 F.2d 781, 783 (1st Cir. 1965) (rejecting application of 1934 Act's limitations periods to §10(b) claims). See also *Lorenz v. Watson*, 258

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6. Sitting by designation in *Davis*, Senior Circuit Judge Aldisert of the Third Circuit (the author of the opinion below) separately expressed the views on §10(b) borrowing and tolling that just two months later would form the holding of his opinion in this case. 839 F.2d at 1370-76. But the Ninth Circuit in *Davis* rejected those views, and adhered to the borrowing and tolling precedents of that court. 839 F.2d at 1369-70.

F. Supp. 724, 733-34 (E.D. Pa. 1966) (expressly rejecting limitations periods contained in Sections 9(e) and 18(c) of Securities Exchange Act).

The district courts, too — including a district court within the Third Circuit — have reacted adversely to the decision below. See *Cohen v. McAllister*, 688 F. Supp. 1040, 1045 n.3 (W.D. Pa. 1988) ("The view [of the Third Circuit] that the fraudulent concealment doctrine does not apply in this [§10(b)] case flies in the face of Justice Frankfurter's statement that '[t]his equitable doctrine is read into every federal statute of limitations.' *Holmberg v. Armbrecht*, 327 U.S. 392, 397 (1946)."); *Lubin v. Sybedon Corp.*, 688 F. Supp. 1425, 1442 (S.D. Cal. 1988) (applying equitable tolling and rejecting, *after* the opinion below, "the novel argument that in light of . . . *Agency Holding* the court should adopt a *uniform* statute of limitations for Rule 10b-5 claims") (emphasis in original). See 5C Jacobs, *Litigation and Practice Under Rule 10b-5* (2d ed., 1988 rev.) §235.02 at 10-6 to 10-10 & n.5 ("[T]he cases refuse to adopt . . . the statutes of limitations found in other 1933 Act and 1934 Act remedies"); 3A H. Bloomenthal, *Securities and Federal Corporate Law* §8.31[3][c] at 8-156.16 (1986) ("universally accepted that the federal doctrine of equitable tolling is read into the borrowed statute of limitations with respect to claims arising under Rule 10b-5").

5. Contrary to respondents' apparent belief (Tolins & Lowenfels Br. 18), the decision below directly and concretely affects petitioner and the certified shareholder class in this litigation. The judgment entered by the court of appeals *reversed* the district court's order denying respondents' motion to dismiss the §10(b) claim (App. B., p. 61a; App. C, pp. 66a-67a), and remanded "for further proceedings consistent with the opinion of this Court." (App. C, p. 67a). The holding of the court of appeals was "that the proper period of limitations for a complaint charging violation of section 10(b) and Rule 10b-5 is one year after the plaintiff discovers the facts

constituting the violation and, in no event, more than three years after such violation." (App. A, p. 32a). The motion to amend the complaint against respondents was filed in September 1985 and the complaint itself was filed in January 1986, more than three years after the 1981 time period involved in this case. Moreover, in *Hill v. Equitable Trust Co.*, 851 F.2d 691 (3rd Cir. 1988), the Third Circuit applied the decision below to a §10(b) case that was filed before the opinion below was issued. Petitioner has standing to seek review in this Court.

CONCLUSION

Respondents urge denial of review on the ground that the decision below is merely a routine application of this Court's precedents in an area of peripheral importance. Respondents, however, can minimize neither the substantial impact the court of appeals' decision is having on securities litigation in district courts throughout the country, nor the stultifying effect the decision below is exerting on "the congressional policy favoring private suits as an important mode of enforcing federal securities statutes." *Pinter v. Dahl*, No. 86-805 (June 15, 1988), Slip Op. 9.

Petitioner submits that this is one of those unusual cases that satisfies all standards of this Court for granting a writ of certiorari. The questions presented in the petition are ripe for decision and cannot be altered or illuminated by any further proceedings below. The question of the appropriate statute of limitations governing §10(b) actions is, in fact, most appropriately resolved at this time. *Wilson v. Garcia*, 471 U.S. 261, 264-66 (1985); *Agency Holding Corp. v. Malley-Duff & Associates*, No. 86-497 (June 22, 1987), Slip Op. 2-3; *Gillespie v. United States Steel Corp.*, 379 U.S. 148, 153-54 (1964). Guidance now from this Court on the issue will not only materially assist in efficient resolution of this litigation, but will

also materially assist all the lower courts in their consideration of §10(b) fraud actions.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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